Appendix A

In the
United States Court of Appeals
for the Fifth Circuit
DECEMBER 1, 2003

No 02-20235

CAPTAIN SHERIFF SAUDI,

Plaintiff-Appellant,

VERSUS
S/T MARINE ATLANTIC, ETC., ET AL.,

Defendants,

MARINE TRANSPORT LINES, INC.,
OWNER/MANAGER OF THE VESSEL "MARINE ATLANTIC";

MARINE TRANSPORT CORPORATION,
OWNER/MANAGER OF THE VESSEL "MARINE ATLANTIC,"

Defendants-Appellees.

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N⁰ 02-20563

CAPTAIN SHERIFF SAUDI,
Plaintiff-Appellant,
VERSUS
S/T MARINE ATLANTIC, ETC., ET AL.,
Defendants,
MARINE ATLANTIC LTD.; ACOMARIT
SERVICES MARITIME, S.A.;
OSPREY ACOMERIT SHIP MANAGEMENT, INC.;
KOCH SHIPPING, INC.; KOCH SUPPLY AND
TRADING COMPANY,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
N⁰ H-99-CV-2367

Before SMITH, BARKSDALE, and CLEMENT,
AFFIRMED. See 5TH Cir. R. 47.6.
Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH Cir.- R- 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R 47.5.4.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a MIT Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINES CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L. P., JURONG SHIPYARD, LTD. AND UNITED STATES TATES TRUST COMPANY OF NEW YORK,
Defendants

FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

Pursuant to the Court's memorandum and order of September 15, 2000 (#222), granting summary judgment in favor of Defendants Koch Shipping Inc. and Koch Supply & Trading Company Ltd. n/k/a Koch Petroleum Group, L.P., and its memorandum and order of February 20, 2001, granting summary judgment (#264) in favor of Defendant Osprey Ship Management, Inc., and because the Court finds no just reason for delay, the Court hereby

ORDERS that the Clerk of the Court shall enter FINAL

SUMMARY JUDGMENT in favor of Defendants Koch Shipping Inc., Koch Supply & Trading Company Ltd. n/k/a Koch Petroleum Group, L. P., and Osprey Ship Management, Inc. against Plaintiff Captain Sheriff Saudi on all claims against these Defendants, pursuant to Fed. R. of Civ. P. 54 (b).[1] Plaintiff shall take nothing and shall bear all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 10th day of April, 2002.

MELINDA HARMON
STATES DISTRICT JUDGE

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[1] The Court dismissed the following parties without prejudice for lack of personal jurisdiction: Acomarit Services Maritimes, S.A. (#44, January 31, 2000); Appleton Marine Inc. and Appleton Machine Company, Inc. (#159, August 31, 2000, finalized #183, October 17, 2000); and Marine Atlantic Ltd. (#237, December 21, 2000). These dismissals were final when the orders were entered, should there be any question of finality with respect to Captain Saudi's appeal of the Court's entry of final judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) in favor of Defendants Marine Transport Lines, Inc. and Marine Transport Corporation against Plaintiff on all claims that Captain Saudi asserted against these Defendants (#310 & 311, January 24, 2001).

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI
Plaintiff
VS.
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD.,. JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S S.A., OSPREY ACOMARIT SHIP MANAGEMENT., INC., VALMET- APPLETON, INC., APPLETON MACHINES Co. (Appleton Marine Division), S. APPLETON MACHINE CO., INC., APPLETON MARINE., INC., JOHN DOE COMPANY, Designer of the Crane, KOCH SUPPLY AND TRADING GROUP, N/K/A KOCH PETROLEUM GROUP, LL. P. MARINE TRANSPORT LINES, INC., MARINE TRANSPORT CORPORATION. JURONG" SHIPYARD, LTD.. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

RULE 54(b) FINAL JUDGMENT

Pursuant to the findings of fact and conclusions of law issued by this Court on this date in support of its oral Rule 52 (c) judgment on partial findings at trial on January 10, 2002, the Court

ORDERS that FINAL JUDGMENT Is GRANTED in favor of Defendants Marine Transport Lines, Inc. and Marine Transport Corporation on all claims asserted against them by Plaintiff

Captain Sheriff Saudi. Plaintiff shall take nothing and shall bear all costs of court.

THIS IS A FINAL JUDGMENT. SIGNED at Houston, Texas, this 24th day of January, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.

CIVIL ACTION NO. H-99-2367 S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINE CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE ' COMPANY, Designer of the Crane, KOCH SUPPLY AND TRADING GROUP, N/K/A KOCH PETROLEUM GROUP, L.P. MARINE TRANSPORT LINES, INC., MARINE TRANSPORT CORPORATION. JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING RULE 52(c) JUDGMENT ON PARTIAL FINDINGS

In the above referenced personal injury/products liability action in admiralty, Plaintiff Captain Sheriff Saudi's ("Plaintiff's" or "Saudi's") claims against marine Transport Lines, Inc. ("MTL") and Marine Transport Corporation ("MTC") were tried to the bench on January 7-10, 2002.[1] After Plaintiff rested, Defendants orally moved for judgment on partial findings under Federal Rule of Civil Procedure 52(c), and the Court granted the motion. Plaintiff was accorded the opportunity to file a post-trial brief by January 17, 2001, but failed to do so. Therefore the Court now issues the following findings of fact and conclusions of law supporting its ruling.

FINDINGS OF FACT

On May 17, 1999, the date of the accident at issue in this case, Captain Sheriff Saudi ("Saudi") was employed by American

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[1] MTL and MTC were the only Defendants remaining that appeared for trial. On May 17, 2000 the Court granted Plaintiff's motion for default judgment (#91) against Jurong Shipyard, Ltd., but reserved the question of its unliquidated damages for trial, where it did not appear. On January 31, 2000 (#44), it granted Acomarit Services Maritimes, S.A.'s motion to dismiss for lack of jurisdiction. On March 3, 2000 Defendant Koch Petroleum Group L.P. was dismissed without prejudice when the Court granted Saudi's motion to nonsuit that entity (#62). After allowing substantial time for discovery, on September 5, 2000, the Court granted Appleton Marine Inc. and Appleton Machine Company, Inc.'s ("the Appleton Defendants"') renewed motion to dismiss for lack of personal jurisdiction and United States Trust Company of New York's ("U.S. Trust's") motion for summary judgment (#159). The Appleton Defendants' dismissal was finalized on October 17, 2000 (#183), while a Rule 54(b) final summary judgment in favor of U.S. Trust was entered on December 19, 2000 (#230). Pursuant to a stipulation of all parties, Valmet, Inc. was dismissed on October 26, 2000 (#186). On December 15, 2000, the Court granted Koch Shipping, Inc. and Koch Supply & Trading Company, Ltd. n/k/a Koch Petroleum Group, L.P.'s motion for summary judgment (#222). On December 21, 2000, the Court dismissed Marine Atlantic Ltd. for lack of personal jurisdiction (#237) . Finally, on February 20, 2001, the Court granted osprey Ship Management, Inc.'s motion for summary judgment (#264).

Eagle Tankers.[2] Koch Petroleum Group L.P. ("Koch") had chartered the ST MARINE ATLANTIC from its owner, Marine Atlantic Ltd. American Eagle Tankers, in accordance with a contract it had with Koch, had furnished Saudi, an experienced mooring master and a licensed mariner, who was acting in that capacity during the traditional maritime activity of a lightering operation, to help in lightering operations involving the ST MARINE ATLANTIC in navigable international waters of the Gulf of Mexico. Saudi was being transferred from the ST MARINE ATLANTIC to a small tender vessel, the M/V AMERICAN DISCOVERY, in a personnel basket by means of a portside cargo hose crane affixed to the ST MARINE ATLANTIC, when a splined-shaft coupling between the motor/brake unit and the luffing winch in that crane failed. Up until that time, there was no indication of any problems in the splined shaft couplings in any of the cargo hose handling cranes on the ST MARINE ATLANTIC or its sister ship, the ST MARINE PACIFIC.[3] Because of the failure of the ST MARINE ATLANTIC's portside crane's coupling, the crane collapsed, dropping Saudi and the basket about fifty feet into the water, and the crane and its wires fell on top of him and severely injured him.

In determining whether MTL and/or MTC is liable, the Court examined the history of the vessel up to the time of the accident.

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[2] American Eagle Tankers was never a party to this suit.

[3] There was evidence that a hydraulic motor on the starboard crane failed in the fall of 1995, but there was no evidence that it had anything to do with the splined shaft coupling at issue here.

The ST MARINE ATLANTIC was originally known as the UST ATLANTIC, although none of the witnesses at trial was certain of, nor did the documentary evidence explain, the reason. A crude oil carrier that is still one of the largest in the world, the vessel was built under full survey to meet the rules of the American Bureau of Shipping ("ABS")[4] by the Newport News Shipbuilding and Dry-Dock Company ("Newport News") in Newport News, Virginia. Richard Farman, MTL's Technical Director during the relevant period, testified that the vessel was originally built under the auspices of the United States Coast Guard to sail under the United States flag. Greg Doyle, chartering manager for MTL International Ship Management, Inc. ("ISM"), to be discussed infra, stated that the designs of the cranes constructed for the vessel were submitted to the United States Coast Guard and approved.

During construction Newport News installed two cargo hose handling cranes, designed and manufactured by Appleton Marine Division of the Appleton Machine Company of Appleton, Wisconsin, manual, a copy of which was kept on the vessel. Defs.' Ex. 30.

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[4] As reflected in the record and the trial evidence, the ABS develops rules, standards and guidelines for the design, construction, and operational maintenance of vessels, provides classification services, and keeps records for vessels "in class." A classification by ABS reflects that a vessel is structurally and mechanically fit for a particular use or service according to ABS' rules and standards. Insurance companies generally require such classification before insuring a vessel and major oil companies, before chartering it for use. After its construction, the vessel in dispute here was classified by the ABS as 11+A1 (E) Oil Carrier." .

The cranes, one mounted on the starboard side and one on the port side of the vessel, were each rated as having the capacity to bear fifteen metric tons safely. The vessel was delivered by Newport News to its original owner, most likely the Shell Oil Company or one of its affiliates, in 1979 and was first managed by the Interocean Management Corporation ("Interocean") of Philadelphia, Pennsylvania.

For thirteen years, from approximately August 1981 until July 1994, the vessel was taken out of service and anchored in Labuan Bay, on the coast of Sabah, Eastern Malaysia under the care of BP Shipcare, which is in the business of providing long-term care to tankers in lay-up. In February 1994, Marine Atlantic Ltd., a Liberian corporation, purchased the vessel, transferred it from United States registry to Liberian, and renamed it the ST MARINE ATLANTIC.

MTL is a subsidiary of MTC. Defs. Ex. 45, Telefacsimile from Peter N. Popov, General Counsel of MTC. Around February 15, 1994 ISM,[5] a special purpose subsidiary of MTL, contracted with Marine Atlantic Ltd., the new owner of the ST MARINE ATLANTIC, to operate and manage the vessel.

The issue of ownership of the vessel has been implicitly raised by Plaintiff's suing a large number of Defendants with names containing the word "Marine." Defendants have argued that the April 1998 edition of the Register of International Shipowning

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[5] ISM was also never sued in this action.

Groups erroneously indicated that the ST MARINE ATLANTIC and her sister ship, the ST MARINE PACIFIC, were owned by ISM. Long before the accident at issue here, Peter Popov sent a letter dated August 13, 1998 to the Register of International Shipowning Groups and the Tanker Advisory Center to correct the misinformation. Defs.' Ex. #45. Plaintiff has not controverted the corrected information presented in that letter, which the Court now summarizes.

Popov's letter explains that ISM is an indirect, Liberian subsidiary of MTL and was organized in January 1994. In February 1994, Marine Atlantic Ltd. bought the ST MARINE ATLANTIC, while Marine Pacific Ltd. purchased the sister vessel, the ST MARINE PACIFIC. Id.[6]

Following the purchases of the vessels, ISM took over the technical operation of both vessels; MTL International Tankers, Inc. (another indirect Liberian subsidiary of MTL organized in January 1994) began commercial management of the two vessels; and MTL assumed the accounting duties. Id. The contract between MTL and Marine Atlantic Ltd. was terminated by Marine Atlantic Ltd. on December 12, 1995 (Defs.' Ex. #51), and ISM stopped operating and managing the vessel on January 29, 1996, when ISM delivered the two vessels to its successor, Acomarit Services Maritimes, S.A. ("Acomarit"). Ex. 1 to Popov Affidavit. MTL's accounting duties with respect to the ST MARINE ATLANTIC ended several months after the vessels were delivered to Acomarit, three years before Saudi's injury on May 17, 1999. Popov states that at the time he was writing the letter, Acomarit was the technical manager of both ships, and Defendants' counsel currently represents that it still is; Salisbury House, Inc. of Brookline, Massachusetts was performing the commercial management; Marine Atlantic Ltd. continued to own the ST MARINE ATLANTIC; and Marine Pacific Ltd. continued to own the ST MARINE PACIFIC. Id.[7]

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[6] Popov's letter indicates that the stock of the two purchasers was owned by Monte Christo Shipholdings, Ltd. On February 16, 1994 MTL acquired a small minority position in Monte Christo. MTL sold that stock on March 21, 1996 and has since had no interest in Monte Christo, Marine Atlantic Ltd., Marine Pacific Ltd., or either of the sister vessels.

The evidence at trial showed that while the ST MARINE ATLANTIC was anchored in Labuan Bay, qualified representatives of MTL and ISM visited the vessel and prepared a "reactivation specification" to identify what would have to be done to bring the vessel up to trading standards and to determine if reactivation would be worthwhile. Richard Farman was among those hired by MTL to inspect the vessel for possible reactivation, and he testified from personal knowledge about the evaluation process. Because there was little prior history for the vessel, since it had only operated from 1979-81 before being deactivated for thirteen years, to insure that the reactivation specifications would encompass all necessary refurbishment, they investigated the following available sources of information. The MTL and ISM representatives asked the initial vessel manager, Interocean, and caretaker during deactivation, BP Shipcare, if they were aware of any problems in connection with the operation and use of the cranes and of any maintenance done on the cranes. They reviewed all reports generated by BP Shipcare to identify any problems or faults. Moreover, because the sister vessel, ST MARINE PACIFIC, had been reactivated eighteen months earlier, they reviewed all records of problems it had experienced to be included in reactivation work on the ST MARINE ATLANTIC. Defs.' Ex. 25. They also reviewed the crane manual for specific information about inspection, maintenance, and lubrication required for the cranes.

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[7] Moreover, in the course of this litigation Marine Atlantic Ltd. came forward identified itself as the owner of the ST MARINE ATLANTIC at the relevant times. That admission was the basis for the summary judgment granted in favor of U.S. Trust Company of New York (#159 and 230), which Plaintiff had sued apparently because the vessel was initially known as the UST Atlantic. When Plaintiff continued to pursue and harass U.S. Trust Company of New York without any showing of objective evidence to support his suit, this Court imposed monetary sanctions on Plaintiff.

Significantly, the crane manual did not verbally mention the splined-shaft coupling in dispute here; the only "reference" to t was its inclusion as a part of the crane in a single diagram and its identification as a coupling in the index. Moreover, as reflected in the evidence, because of the design of the crane, the coupling was not immediately nor easily visible; it was hidden behind a bolted metal plate. Even if the plate were removed, to inspect the four-inch-long, two-to-three-inch-diameter coupling in the crane, one would have to remove the splined shafts from it by unbolting and removing substantial parts or all of the luffing winch assembly on one side or of the motor/brake assembly on the other. Even if it had been exposed to view, the coupling, itself, gave no notice that lubrication might be needed: it was designed and installed without a grease fitting or nipple or any other device that would permit lubrication of the inside of the coupling where it touches the splined shafts. The design also did not suggest there were moving parts within the coupling. In fact, Richard Farman, MTL's very knowledgeable Technical Director, credibly testified that the coupling was not designed to move, but was designed to be locked in position and have no friction within it. He stated that it was designed to act as one with the shaft and not to have internal moving parts or require lubrication. That information was not controverted by any evidence submitted by Plaintiff. Nor did the crane manual instruct that the coupling needed periodic inspection, lubrication, or any other type of maintenance. Indeed there is no evidence that anyone knew of the existence of or location of the coupling or of the need for maintaining it before Saudi's accident on May 17, 1999, nor is there any evidence of any other such coupling failing in similar cranes from the same manufacturer.[8] Indeed all the evidence suggests that the failure of the coupling was an unpredictable freak accident.

In sum there was no history or indication from Interocean, BP Shipcare, the sister ship ST PACIFIC MARINE, the operating history of the ST MARINE ATLANTIC, the manual, or the design of the coupling that the splined-shaft coupling was a source of any problems that should have alerted anyone to inspect, modify, service, or maintain the coupling either during the reactivation nor afterward, prior to Saudi's accident.

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[8] Greg Doyle testified that normally a vessel repairman relies on the manufacturer's manual for maintenance instruction. He corroborated Farman's testimony that neither the manual nor the design nor any problem with the equipment alerted the reactivators to a need for maintenance of the coupling.

After bids were solicited from shipyards in Southeast Asia, the reactivation contract was awarded to Keppel Shipyard, a division of Keppel Corporation Ltd. ("Keppel"),[9] and the ST MARINE ATLANTIC was towed to Keppel's Singapore shipyard for the work. Richard Farman, with his substantial experience, described Singapore as "probably the premier ship repair port in the world" and Keppel as "the number one or two" shipyard there. The drydocking and reactivation took approximately seven months, from July 1994 until January 1995, at a cost of several million dollars.

Keppel and its subcontractors inter alia made numerous modifications and refurbished substantial parts of the vessel, including installation of a new incinerator, crude oil washing machines, tank-level gauging and temperature monitors, valve remote systems involving the refurbishment of more than ten miles of hydraulic tubing, remote pressure monitoring for cargo system, an alarm monitoring system, boiler management system, scrubbing tower, antifouling system, retrofit of inert gas system, boiler tube modifications, adding underwater hull markings, hull repair, modification of the distilled water tank, shaft seal changes, and boiler heater fabrication.

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[9] Keppel has not been sued in this action.

During the reactivation, the owner, Marine Atlantic Ltd., paid three independent contractors, who were not employees of ISM or MTL, to function as Marine Atlantic Ltd.'s representatives to monitor the reactivation to insure that the work performed was according to specification and appropriate standards and that it was properly and timely accomplished. The three representatives did not perform any hands-on work in any of the modifications, replacements, and repairs during the reactivation, but met daily with Keppel managers, observed the work being performed, and assessed whether the charges were appropriate. They could also authorize additional work beyond that specified in the reactivation contract if the need arose, but no evidence was presented that they did. These three independent contractors reported daily to MTL's Richard Farman, who testified that he was responsible for managing the reactivation from his office in Weehawken, New Jersey. The three representatives also sent invoices for their services to MTL, which arranged for payment from a bank account funded by Marine Atlantic Ltd.

The very credible testimony of Richard Farman, MTL's Technical Director, was the only evidence relevant to the issue of whether MTL is liable, other than the far less comprehensive testimony of Greg Doyle, the chartering manager of ISM, which did not contradict Farman's testimony. Farman explained that because of the reactivation and the fact that the vessel, newly purchased by Marine Atlantic Ltd., a Liberian corporation, would be under Liberian registration and carrying the Liberian flag, certain tests and statutory trading certificates were required. These surveys, i.e., inspections, were not carried out by Liberia, but by classification societies that certify that particular inspections have been done. A vessel cannot carry on trade without such trading certificates in force. Indeed, the history of inspections of the ST Marine Atlantic reflects reasonable and prudent care of the vessel under the circumstances.

In December 1994, both cargo hose handling cranes were load tested to 18.75 metric tons (125% of their safe working load of 15 metric tons) by Keppel, as witnessed by an ABS surveyor and one of the owners' representatives. Both Keppel and ABS certified the load test and provided the certificates to MTL in Weehawken, New Jersey. Defs.' Ex. #49. The vessel left the Keppel Shipyard and completed sea trials in January 1995 and was rated "in class."

The ABS, acting as a classification society and on behalf of Liberian authorities, conducted regulatory and statutory surveys throughout the reactivation and issued various certificates, as required before the ST MARINE ATLANTIC would be able to trade.[10] The ADS performed surveys and inspections of the vessel in dry docking, a tail-shaft survey, an annual survey of hull, an annual load line inspection, an annual survey of machinery, an annual survey of automation, an annual survey of inert gas system, a special survey of machinery, a special survey of automation, a special survey of inert gas system, a port main water tube survey, a starboard main water tube boiler survey, a gauging report, and a tonnage confirmation survey. The ABS also performed surveys for safety construction, safety equipment, safety radio and international loadline. It performed a condition assessment survey and rated the cargo hose handling crane as "Grade 1," meaning "Condition superior in all respects; very well maintained; a condition of unimpaired original strength and/or efficiency; no maintenance or repair required." Defs.' Exs. # 41, p. 5, item 4 and #31, 46,47, 48.

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[10] Richard Farman testified that ABS inspects all critical parts of the vessel, but it does not require the breaking down of all parts. If a problem is noticed, e.g., overheating, untoward noises or abnormal movement, the inspector has the discretion to determine whether a breakdown of a particular part or system is needed.

When the reactivation was nearly completed, Marine Atlantic Ltd. contracted with Clyde Marine of Glasgow, Scotland to furnish officers and crew, all employees of Clyde Marine, for the vessel. Thus the regular maintenance of the vessel in January 1996 became the responsibility of the chief engineer and officers on the vessel. Clyde Marine's invoices were paid from a bank account funded by Marine Atlantic Ltd.

Furthermore, after Acomarit took over as manager in January 1996, the port cargo hose handling crane on the ST MARINE ATLANTIC was load-tested off the United Arab Emirates three times before Saudi's accident. In November 1996, it was weight-tested to 18.20 metric tons under the observation of an ASS surveyor, who issued a certificate. Defs.' Ex. 32. In March 1998, both hose handling cranes were serviced and load tested offshore of Dubai and 'the portside crane was load-tested to 18.75 metric tons. Defs' Ex.

17, 18. On March 3, 1998 Claymore Security and Safety Consultants issued a certificate attesting to its weight-bearing capacity. Defs.' Ex. #20. In December 1998 during a special survey and docking survey of the ST MARINE ATLANTIC in Singapore, both cranes were load-tested and certified by Jurong Shipyard Ltd., while the load test was also witnessed and certified by an ABS surveyor. Defs.' Exs. 22, 15. In addition, Thomas Garrett, an inspector with a special interest in cranes, acting on behalf of a major oil company, performed a vetting inspection aboard the vessel in early 1997 that included extensive operational tests of both cranes. The manual was also examined. No substandard condition of the internal mechanisms of the cranes was discovered, nor were there any unusual noises or vibrations that might have alerted an inspector to the need for the inspection, maintenance, repair or replacement of any crane part. Finally, before Koch or an affiliate chartered the vessel, it hired PacMarine Services of Singapore to conduct an on-hire survey in January 1999 while the vessel was anchored off Singapore. Defs.' Ex. 29. The survey specifically reported, "Crane structures noted in apparent sound condition and both cranes in working condition." Id. at 00242.

At trial Plaintiff produced the clearly corroded coupling, which was cut apart for removal and damaged in the process, as demonstrative evidence, as well as a photograph (Plaintiff's Ex. 90) taken of it after its removal following the accident. Richard Farman testified that he believes corrosion caused the crane's boom arm to fall. Nevertheless, Plaintiff did not demonstrate that the condition of the coupling was dangerous or required refurbishment or prophylactic maintenance from 1994-96, the period when MTL had some factual or legal relationship to the ST MARINE ATLANTIC. Moreover, as Farman credibly explained, because neither the manual nor the design of the portion of the crane covering the crane indicated that the coupling existed and required greasing, and because there was no known problem that would have alerted the refurbishers to look for it, no maintenance could reasonably have been expected.[11] Farman further observed that he did not know how one could test it in its normal working position and condition. Indeed, the coupling had to be cut in half to remove and inspect it after the accident and it was damaged in the process.

MTC and MTL owed no legal duty of care to Plaintiff given .the circumstances of this case. Plaintiff has failed to show that MTC had any involvement with the ST MARINE ATLANTIC, no less a relationship that would have given rise to a duty of care and potential exposure to liability from Saudi. There is no evidence in the record that MTL owned, operated or chartered the ST MARINE ATLANTIC, or that it employed Plaintiff. The evidence demonstrates that MTL's limited management role relating to the ST MARINE ATLANTIC on behalf of the owner, Marine Atlantic Ltd., related to

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[11] Farman, the only trial witness knowledgeable about the reactivation and the design of the crane, stated that he could not tell how much corrosion would have been present in 1994. He further stated that at that time neither he nor anybody else knew that the coupling existed behind the steel plate and that to the best of his knowledge, the coupling was not disassembled.

Farman's management from New Jersey of three independent contractors at the Keppel Shipyard monitoring reactivation of the vessel from 1994-96, and to ministerial accounting actions of paying Marine Atlantic Ltd.'s employees. During reactivation, MTL was responsible for having invoices from Keppel and from the ST MARINE ATLANTIC's new officers and crew, provided by Clyde Marine, paid from accounts funded by Marine Atlantic Ltd. No MTL employee had any hands-on or physical involvement in the repairs, modifications, and reactivation of the vessel.

CONCLUSIONS OF LAW

This Court has admiralty or maritime subject matter jurisdiction over this action under 28 U.S.C. 1333(1), giving federal district courts "original jurisdiction . . . of . . . [a]ny civil case of admiralty jurisdiction." This Court has admiralty jurisdiction over a tort action where the alleged tort occurred on or over navigable waters and where the activity giving rise to the incident had a substantial relationship to traditional maritime activity such that the incident had a potentially disruptive influence on maritime commerce. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531-32 (1995); Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 351-52 (5th Cir. 1999). Where an injury occurs on navigable waters of the United States because of defective repairs that were made on land, the matter falls within admiralty jurisdiction. Todd Shipyards Corp. v. Turbine Service, Inc.., 467 F. Supp. 1257, 1295 (E.D. La. 1978), aff'd in part, modif'd in part, and rev'd in part, 675 F.2d 401 (5th Cir. 1982), cert. denied, 459 U.S. 1036 (1982).

Regarding a judgment on partial pleadings, Federal Rule of Civil Procedure 52(c) provides,

> If during a trial without a jury a party has been fully heard on an issue and the -court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) or this rule.

The Advisory Committee Notes state, regarding the 1991 Amendment that added (c) to the rule, that " [i] t authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence." Moreover the notes make clear,

> Judgment entered under this rule differs from a summary judgment under Rule 56 in the nature of the evaluation made by the court. A judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact, and the finding is reversible only if the appellate court finds it to be "clearly erroneous." A summary judgment, in contrast, is made on the basis of facts established on account of the absence of contrary evidence or presumptions; such establishments of fact are rulings on questions of law, as provided in Rule 56(a) and are not shielded by the "clear error" standard of review.

The district court need not consider the evidence in a light favorable to the plaintiff, but instead may issue a judgment in favor of the defendant if it determines that the plaintiff's evidence is insufficient to make out a claim. Geddes v. Northwest Missouri State University, 49 F.3d 426, 429 n.7 (8th Cir. 1995). Furthermore, when the district court's findings involve a determination regarding credibility of a witness, Rule 52 requires "'even greater deference to the trial court's findings.'" Samson v. Apollo Resources, Inc., 242 F.3d 629, 632-33 (5th Cir. 2001)) quoting Anderson v. City of Bessemer City. N.C., 470 U.S. 564, 574 (1985)), cert. denied, 122 S. Ct. 63 (2001) . The district court's findings of fact are reviewed for clear error, its conclusions of law are subject to de novo review, while its evidentiary rulings are reviewed for "abuse of discretion." Id.

Admiralty law recognizes causes of action for negligence and products liability, including strict liability. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986).

The Restatement (Second) of Torts 402A provides as follows a cause of action for strict products liability:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Comment (f) to § 402A states, "The rule does the occasional seller . . . of products who is not engaged in that activity as part of his business."

MTC and MTL are not strictly liable to Saudi for his injuries. Section 402A is not applicable to MTC and MTL because they were not sellers of the crane or its coupling and were not engaged in the business of selling such a product. MTL manages services.

In maritime tort cases, the Fifth Circuit applies general principles of, negligence law. Daigle v. Point Landing, Inc., 616 F.2d 825, 827 (5th Cir. 1980) . A duty of care may arise under general maritime law from the application of reasonableness and prudence to existing circumstances. Coumou v. United States, 107 F.3d 290, 295-96, withdrawn and superseded in part on reh'g, 114 F.3d 64 (5th Cir. 1997). A negligence cause of action in admiralty requires a plaintiff to prove the same elements for negligence as those under common law: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) breach of that duty of care; (3) a causal connection between the offending conduct and the resulting injury; and (4) actual injury suffered by the plaintiffThomas J. Schoenbaum, Admiralty and Maritime Law 5-2 at 170 (3d ed. 2001). In Daigle, 616 F.2d at 827, the Fifth Circuit quoted the following from 57 Am. Jur.2d Negligence 72 at 423 (1971):

> [T]he care which must be exercised in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed. The degree of care necessary to constitute the ordinary care required of a person upon any particular occasion is measured by reference

> to the circumstances of danger and risk known to
> such person at the time. . . .

Negligence is only actionable if it is a "legal cause" of the plaintiff's injuries. Tidewater Marin, Inc. v. Sanco Intern., Inc., 113 F. Supp.2d 987, 998 (E.D. La. 2000), citing Donaghey v. Ocean Drillinq Exploration Co., 974 F.2d 646, 648 (5th Cir. 1992). "'Legal cause is something more than 'but for' causation.'" Id., quoting Donaghey, 974 F.2d at 648 (quoting Thomas v. Express Boat Co., Inc., 759 F.2d 444, 448 (5th Cir. 1985)). Therefore the defendant's negligence must be a "substantial factor" in bringing about -the injury. Id. "Substantial factor" means "more than but for the negligence, the harm would not have resulted." Id., citinq and quoting Chavez v. Noble Drilling Corp., 567 F.2d at 289.

The Restatement (Second) of Torts 404, dealing with negligence in making, rebuilding or repairing a chattel, states, "One who as an independent contractor negligently makes, rebuilds or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels." Comment (b) of 404 states that "it is not necessary that [the independent contractor's] negligence have changed the condition of the chattel for the worse. It is enough that the chattel because of his negligence is not in that safe condition in which a competent contractor would have put it and that it is used, or permitted to be used, in reliance upon the care and competent [sic] of the contractor." Regarding liability of a negligent manufacturer of a chattel, the Restatement (Second) of Torts 395 provides,

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

MTC and MTL are not liable as repairers of chattels because they performed no physical repairs or refurbishment on the ST MARINE ATLANTIC during its reactivation or afterward; rather such repairs were done by Keppel employees and subcontractors. Defendants' activities did not give rise to manufacturer status.

MTL and MTC are not liable for negligence generally. MTC was not shown to have any relationship to the ST MARINE ATLANTIC that would give rise to a duty of care. MTL owed no duty of care to Saudi as a manufacturer/repairer relating to reactivation of the vessel. Had MTL owed a duty of care to Saudi, there is no evidence that it did not perform those activities for which it was responsible with reasonable care or that any act or omission by N.TL proximately caused Saudi's injuries.

Because "standard commercial practice requires that a transaction be predominantly for the sale of goods before the Uniform Commercial Code ("U.C.C.") applies, there is a division of opinion whether an implied warranty of merchantability, U.C.C. §

2-314 (i.e., that every contract for the sale of goods contains an implied warranty that the goods are not unsafe or otherwise detective), applies to a contract for services and is cognizable in admiralty. Princess Cruises. Inc. v. General Electric Co., 143 F.3d 828, 832 (4th Cir. 1998), cert. denied, 525 U.S. 982 (1998). The Fourth Circuit has stated that marine contracts predominantly for services are not covered by the U.C.C. Little Beaver Enters. v. Humphrey Rys., 719 F.2d 75, 79 a. 7 (4th Cir. 1983). Although it has-not directly addressed the issue, the Fifth Circuit in a footnote remarked, "[I)n construing a contract for services, courts are free to reason by analogy to [a U.C.C. warranty section)." Princes Cruises, 143 F.3d at 832, quoting Employers ins. of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 765 n.25 (5th Cir. 1989), cert. denied, 493 U.S. 820 (1989). Even if the implied warranty of merchantability applies to the services provided by MTL, MTL is not strictly liable and did not breach an implied warranty of merchantability to Saudi. MTL has never been a "merchant" in the business of manufacturing, selling, or placing in the stream of commerce cranes or crane parts, including the splined-shaft coupling. Its activities do not cloak with manufacturer status. Nor has Plaintiff shown that the coupling was defective when MTL's relationship with the ST MARINE ATLANTIC ended in 1996 and Acomarit took over management of the vessel. "Res ipsit loquitur, or "the thing speaks for itself," is a method to prove negligence by circumstantial evidence.

Prosser & Keaton On Torts § 39 (5th Cir. 1984). The doctrine of res ipsa loquitur may apply "when a thing, which came without fault of an injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." Fruge v. Penrod Drilling Co., 918 F.2d 1163, 1166 (5th Cir. 1990), quoting San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 98-99 (1912). Under the doctrine, the circumstantial facts may give rise to an inference of negligence, but do not compel such. Id. at 1166-67.

The doctrine of res ipsa loquitur does not apply to facts surrounding MTL and MTC because the evidence clearly shows that they did not have exclusive management or control of the ST MARINE ATLANTIC.

MTC and MTL are not liable to Saudi under theories of strict liability, negligence, or breach of implied warranty of merchantability.

Rule 54(b) provides in relevant part,

> When more than one claim for relief is presented in an action, . . .or when multiple parties are involved, the Court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment.

The Court concludes that there is no just reason for delay and directs that entry of final judgment be made in favor of MTC and MTL on all claims asserted against them by Saudi in this suit.

SIGNED at Houston, Texas, this 24th day of January, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., Cow" JOHN DOE COMPANY, Owner of the Vessel-Marine Atlantic. ACOMARIT SERVICES MARITIMES, S.A.. OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINES C. (Appleton Marine Division), 9 APPLETON MACHINE CO., INC., APPLETON MARINE, INC.. JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L. P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK, Defendants

ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, are Plaintiff's motion to disqualify judge pursuant to 28 U.S.C. 455 (a) (instrument #277) and Defendants

Marine Transport Corporation ("MTC") and Marine Transport Lines, Inc.'s ("MTL's") emergency motion regarding Plaintiff's failure to designate portions of depositions to be used at trial (#283).

Plaintiff's motion to disqualify states that on August 3, 2001, he accidentally discovered in a Texas Bar Journal a photograph of the undersigned judge with counsel for the two remaining Defendants in this action, Innes Mackillop. In that photograph, Mackillop was identified as the Executive Director of the Garland Walker Chapter of the Inns of Court, while the undersigned Judge was identified as the President of that same organization. The motions asserts the two "have some sort of ongoing relationship" that is "extrinsic" to the case and apparently "continued for some time during this case and will be ongoing at the time of the trial." The motion notes that neither has disclosed any of their connections. The motion questions the impartiality of the undersigned judge, especially in light of the negative rulings and admonishments directed toward Plaintiff in this case. Plaintiff further questions how many former law clerks of the undersigned Judge have been hired by or worked for law firms representing various Defendants in this case. Plaintiff therefore seeks full disclosure of all connections between Judge Harmon and the opposing counsel and Defendants who have appeared in this case, including the employment of Judge Harmon's former clerks} by the firms who represented the various Defendants before any ruling is made on the instant motion. He also charges that "the facts and record of this case require that Judge Harmon be disqualified and that- a new Judge be appointed to preside over the disposition of Saudi's remaining claims against the remaining Defendants. "

In response, Mr. Mackillop on behalf of MTC and MTL states that had counsel for Plaintiff conferred with him prior to filing the motion to disqualify (as is required by Local Rules! Mackillop would have informed him that the Garland Walker Inn of Court is a member of the American Inns of Court, a national professional organization comprised of over 20,000 state, federal students dedicated to "foster(ing) excellence in professionalism, ethics, civility, and legal skills" in an effort "to perfect the quality, availability, and efficiency of Justice in the United States." He insists that the membership of a judge and a lawyer practicing in that judge's court in such an organization cannot be the basis of any reasonable and objective questioning of the judge's impartiality. He further represents that he is unaware that he or his firm has ever employed anyone previously employed by the Court.

Under 28 U. S . C. 455(a) , a judge should recuse herself in any proceeding in which (her] impartiality might reasonably be questioned." Under 28 U.S.C. 455(b) (1) she "shall disqualify" herself here (she) has a personal bias or prejudice concerning a party . . ." A motion for recusal is subject to the discretion of the district judge, and a denial of that motion is reviewed only for abuse of discretion. United States v. Anderson, 160 F. 3d 231, 233 (5th Cir. 1998). " In order to determine whether a court's impartiality is reasonably in question, the objective observer would question the court's impartiality." Republic of Panama v. American Tobacco Co., Inc., 217 F. 3d 343, 346 (5th Cir. 2000). quoting Trust Co. v. N.N.P., 104 F. 3d 1478. 14941 (5th Cir. 1997) The purpose of 455 is not merely to prevent actual partiality but to "avoid even the appearance of partiality." United States v. Jordan, 49 F.3d 152, 155 (5th Cir. 1995).

This Court finds that Plaintiff fails to provide any objective or reasonable basis for questioning her impartiality in this case. Mutual membership in the American Inns of Court will not serve that purpose. The fact that some rulings in this action were adverse to Plaintiff, without any objective indication that they were based on personal bias, impartiality or prejudice against Plaintiff, Cannot raise an appearance of impartiality in the view of any reasonable and objective person with all the facts. The Court therefore denies the motion to disqualify.

Defendants' motion regarding Plaintiff's failure to designate portions of depositions to be used at trial[1] is based on the Court's Procedures, VII.I.3:

> Counsel will designate the portion of any deposition to be read by citing_ pages and lines in the Joint Pretrial Order. Objections to those portions (citing pages and lines) with supporting authority must be filed at least three business days before trial; the Court will rule on the objections before trial commences.

Plaintiff merely stated that "the full deposition" of each of the nine depositions he intends to offer at trial would be used even though large portions of them are irrelevant or inappropriate. Such an improper tactic will result in forcing Defendants to devote substantial resources to reviewing and preparing objections to volumes of irrelevant testimony or non-testimony. As a remedy, Defendants suggest that Plaintiff be prohibited from using the nine depositions listed in the pretrial order.

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[1] The Court presumes that the motion was originally styled "emergency" because of an imminent trial date, but is no longer because a Continuance was granted.

In response, after the Court granted the continuance of trial until January 7, 2002, Plaintiff states that he has designated portions of the depositions of Captain William Gibbs and Richard Tarman and that he intends to make further designations closer to trial.

The Court makes clear here that both sides will be required to comply with its procedures. Because it appears that Plaintiff has designated some portions of depositions he will use at trial and represents that he will do so timely with all designated in the pretrial order, the Court finds that Defendants' motion is MOOT. Should the issue arise again, however, Defendants may reurge their motion.

Accordingly, for reasons indicated, the Court

ORDERS that Plaintiff's motion to disqualify is DENIED and Defendants' motion relating Plaintiff's failure to designate portions of depositions to be used at trial is MOOT.

SIGNED at Houston, Texas, this 8th day of November, 2001.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-236-7

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S . A. , OSPREY ACOMARIT SHIP United States Courts MANAGEMENT, INC., VALMET- Southern District of Tens APPLETON, INC., APPLETON MACHINE ENTERED CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., JUL 2 4 2001 APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, Michael N, Milby, Clerk of Court KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, are the following motions and matters needing a ruling:

(1) Defendants Marine Atlantic Ltd., Osprey Ship Management ("Osprey"), and Marine Transport Corporation's ("Transport's") joint motion to strike Plaintiff's expert witnesses (instrument #220), Salah Mahmoud & Captain Sheriff Saudi, United States Magistrate Judge Frances Stacy's memorandum and recommendation of 1/26/01 (#258) that Defendants` motion to strike be granted in part, and Plaintiff's objections and exceptions to that memorandum and recommendation (#262); (2) Plaintiff Captain Sheriff Saudi's motion for rehearing (#242) of the Court's order granting summary judgment on Plaintiff's claims for punitive damages (#224); (3) Joe Alfred Izen, Jr. and Afton Jane Izen's motion for rehearing or new trial (#244) on a Rule 54(b) final judgment, signed on December 19, 2000 (#230), awarding fees and expenses to Defendant U.S. Trust Company of New York ("U.S. Trust") under 28 U.S.C. 1927, to be paid jointly by Plaintiff's attorneys, and Defendant U.S. Trust's related motion for sanctions and to strike (#260) the Izens' supplement to motion for new trial

> (#254) and trial exhibit to their motion (#259) ; (4) Plaintiff's motion for rehearing (#245) on order signed on December 15, 2000 (#222) granting summary judgment to Defendants Koch Shipping, Inc. and Koch Supply & Trading Company Ltd. on all Plaintiff's claims against them; (5) Plaintiff's motion for rehearing (#246) of the Court's memorandum and order dated December 21, 2000 (#237) dismissing Marine Atlantic Ltd. for lack of personal jurisdiction; (6) Plaintiff's cross motion for sanctions (#265); and (7) Defendants Acomarit Services Maritimes S.A., Marine Atlantic Ltd., and Osprey Ship Management Inc.'s opposed motion for entry of final judgment (#266) .

The Court addresses the motions in the same order.

SAUDI'S EXPERT WITNESSES

The trial court has discretion under Federal Rule of Evidence 702 to exclude expert evidence, and that decision is reviewed only for abuse of discretion. Munoz v. Orr, 200 F.3d 291, 299 (5th Cir. 2000), citing Daubert v. Merrell Dow Pharmacy, Inc., 509 U.S. 579, 592-93 (1993), and Boyd v. State Farm Ins. Cos., 158 F.3d 326, 221 (5th Cir. 1998) ("With respect to expert testimony offered in the summary judgment context, the trial court has broad discretion to rule on the admissibility of the expert's evidence and its ruling must be sustained. unless manifestly erroneous."). "The question of admissibility of expert testimony is not . . an issue of fact, and is reviewable under the abuse of discretion standard." General Electric Co. v. Joiner, 522 U.S. 136, 142 (1997); see also Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 667-68 (5th Cir. 1999). The trial judge must first preliminarily assess "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts at issue" to be certain of the relevance and reliability of the evidence. Daubert, 509 U.S. 592-95. The High Court required the district court to be the "gatekeeper" under Rule 702 to insure that these two requirements of relevance and reliability are met. Id. at 2796-97. The Supreme Court identified four, nonexhaustive factors for the trial judge to consider in determining reliability—whether it will assist the trier of fact and can be tested, whether it has been subjected to peer review, the known or potential error rates and the existence of standards controlling the technique's operation, and the extent to which the methodology or technique employed by the expert is generally accepted in the scientific community—but warned they do not constitute a definitive checklist. Daubert, 509 U.S. at 593-94.

In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1174-76 (1999), the Supreme Court extended the gatekeeping function beyond scientific experts to nonscientific testimony because Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" testimony, and underlined that the trial judge "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." The Supreme Court made clear that the test for reliability for nonscientific experts is "flexible" and that "Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Id.

Defendants Marine Atlantic Ltd., Osprey Ship Management ("Osprey"), and Marine Transport Corporation ("Transport") jointly moved to strike the opinions of Plaintiff's experts, Dr. Salah Mahmoud and Plaintiff, himself. Instrument #220. Specifically, Mahmoud opined that a December 1998, American Bureau of Shipping ("ABS"), 50,000-pound-load test of the crane in issue could not have been performed, or could not have been performed and passed as documented, in December 1998 because the crane would not have failed in may 1999, when the aggregate weight of Saudi, his personal belongings, and his radio equipment was no more than 250 pounds, if the crane had been so tested and passed. In finding that Mahmoud's "expert" opinion was inadmissible under Fed. R. EVID. 702,[1] Magistrate Judge Stacy characterized Mahmoud's conclusion as "pure speculation" because Mahmoud admittedly was not present[2] at the stated time of the test, nor did he present any facts or data to support his conclusion.[3] She further found that Mahmoud also failed to address, no less explain, why nothing else that occurred during the six months between the ABS survey and the crane failure could have not have caused or contributed to that failure. Mahmoud also gave his opinion about the rate of corrosion of the teeth on two spline gears (to the point where they could no longer support the load on the crane) based on his unsupported belief that the crane was submerged in salt water. He applied a corrosion rate for metal submerged in saltwater, even though there was no evidence that the crane had ever been submerged. Therefore the magistrate judge found that his opinion rested on insufficient facts and data_ She further determined that his deposition demonstrated that he was not qualified to offer opinions on crane maintenance and inspection requirements. She emphasized that Mahmoud had had no training or experience in the inspection of cranes and was generally unaware of rules, regulations and industry standards' governing the maintenance and inspection of cranes. Lastly, Mahmoud determined that the amount of corrosion on two spline gears, from the difference in length of existing (or intact) teeth and the worn teeth on the gears, was .21 to .25 inches. Although Magistrate Judge Stacy found that Mahmoud had not calibrated the equipment he had used to measure the crane parts at issue and did not know the original diameters of the two gears, she did not strike his opinion as to the amount of corrosion on the two spline gears.

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[1] Before December 1, 2000, Fed. Rule of EVID. 702 stated, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Rule 702 was amended as of December 1, 2001 and made applicable to pending cases by order of the Supreme Court "insofar as is just and practicable." The revised rule provides,

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[2] Mahmoud's deposition, Ex. 2 to motion to strike, at p. 45, ll. 3-14

[3] Mahmoud admitted that he had no evidence or first-hand knowledge that the load test documentation had been falsified, but merely insisted such falsification "was possible." Ex. 2 to motion to strike at p. 46, l.22—p. 47, l. 22

Saudi claimed to be an expert in the following seven areas: (1) the inspection of cranes, (2) the load testing of cranes, (3) applicable standards, rules and regulations regarding crane inspections, (4) applicable standards, rules and regulations regarding load testing, (5) applicable standards, rules and regulations regarding quadrennial inspection of cranes, (6) classification society standards, including those of the ABS, Det Norske Veritas ("DNV"), and Lloyd's of London ("Lloyd's"), for inspection of cranes, and (7) the duties, responsibilities, and the standard of care applicable to the refurbishing of vessels. After reviewing his deposition testimony,[4] Magistrate Judge Stacy found that it conclusively demonstrated that Saudi had no training, experience or personal knowledge that would qualify him as an expert in crane inspection, load inspections, or applicable rules, regulations and industry standards for the inspection of cranes and the refurbishment of vessels. She found that Saudi's many years of experience as a master of vessels, mooring master pilot, and instruction pilot did not qualify him as an expert in crane inspection and maintenance. She therefore recommended that this Court disallow his expert testimony on (1) the inspection of cranes, (2) the load testing of cranes, (3) applicable standards, rules and regulations regarding crane inspections, load testing, and quadrennial inspection of cranes, (4) classification society standards, including those of ABS, DNV, and Lloyd's, for standard of care applicable to the refurbishing of the Marine

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[4] Saudi's complete deposition testimony was submitted as exhibit 1 to the motion to strike.

Atlantic.

Saudi has filed objections and exceptions to Magistrate Judge Stacy's recommendation that the motion to strike be granted in large part (#262), along with a new affidavit of Mahmoud.

First, he objects on procedural grounds that the Court is required to hold an evidentiary hearing at which an expert is given the opportunity to demonstrate the reliability of the factual and scientific basis for his proffered opinion. Daubert, v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993).

This Court concludes that this argument is frivolous. Daubert does not require a hearing, but instead recognizes that the "inquiry" required is "a flexible one." Id. at 594-95. In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 142, 152 (1999)("The trial court must have . . . latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not the testimony was from a deposition and the trial court denied a hearing on the grounds that the record was adequate for a Daubert inquiry. Numerous appellate courts have held that an evidentiary hearing is not required under Daubert, but instead at the discretion of the district court, especially where, as here, there is a sufficient record consisting of depositions to investigate relevance and reliability. See, e.q., Greenwell v. Boatwright,

184 F.3d 492, 498 (6th Cir. 1999) ; Oddi v. Ford Motor Co., 234 F.3d 136, 153-55 (3d Cir. 2000), cert. denied, 121 S. Ct. 1357 (2001); United States v. Benavidez-Benavidez, 217 F.3d 720, 724 (9th Cir.), cert. denied, 121 S. Ct. 242 (2000); Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000).

Substantively, Saudi challenges the magistrate judge's finding that there are no data or reliable methodologies to support Mahmoud's opinion that the December 1998 ABS survey could not have occurred. He contends that there was no survey and that there is no ABS certification to show there was a survey for testing the portside cargo hose crane. He also asserts that it is undisputed that gears the size of those in the crane corrode at a known rate if their stainless steel is exposed to salt water and that such exposure occurred when the vessel S/T Marine Atlantic was anchored for thirteen years in Borneo, Indonesia. It is also undisputed that the meshed teeth and gears of the crane's spline coupling, which were supposed to mesh together, spun freely, allowing the crane arm to collapse. He argues that to the extent that the magistrate judge shifts the burden to Plaintiff or Plaintiff's expert of disproving the existence of non-negligent causes for the crane's failure, the magistrate judge's memorandum and recommendation errs. A plaintiff in a negligence case is not required to disprove the existence of all possible non-negligent causes for his injury; rather he must prove that negligence was the most likely cause. Thus Saudi's experts should not be stricken because their testimony does not provide proof that Plaintiff is not required to produce. He submits a new affidavit from Mahmoud to support this "Exception and objection."

Next, Saudi insists that Defendants' claim that Mahmoud based his corrosion calculations on the belief that the crane was submerged in salt water is false. The deposition excerpt, at p. 22, 1. 24—p. 25, 1.25. demonstrates that Mahmoud said that the crane's metal was "exposed," not "submerged" and distinguished the two terms. Mahmoud then continued to explain that the rate of corrosion was affected by the velocity of salt water moving across the corroding surface. Id. at p. 24, 11. 1—p. 25, 1. 12. Again he refers to Mahmoud's newly submitted affidavit for support.

Third, the magistrate judge's finding that Mahmoud's deposition testimony demonstrates that he is not qualified to offer opinions on crane maintenance and inspection requirements is again based on statements taken out of context, insists Saudi. He argues that just because Mahmoud has not memorized all the ABS rules and regulations and has not worked for a crane manufacture does not mean his testimony is unreliable here. If Defendants had properly remanufactured or refurbished the crane, they would have found the corrosion in 1994. Saudi emphasizes that Defendants have not offered and cannot offer an expert opinion that the corrosion occurred in only five months or five years. He insists that proper lubrication to the gears and splines would have arrested any corrosion and prevented the crane failure. He reiterates that Defendants have admitted that they were unaware of the existence of the spline coupling and the significance of its exposure to salt water and that they never performed maintenance or replaced the corroded parts. Given these facts, he urges, Mahmoud's training and experience are sufficient for a reliable opinion.

Saudi also questions the magistrate judge's finding that Saudi was not qualified to testify on the seven designated areas. Saudi now submits another personal affidavit and a correct copy of the ABS regulations, as well as a copy of the International, Safety Management ("ISM") Code, to support the current objections and exceptions to the magistrate judge's memorandum and recommendation and to show that a master of a vessel or a Mooring Master pilot must be familiar with these regulatory requirements to safeguard his vessel and to insure that it is properly documented and certified for its owners and charterers. Saudi also submits a letter demonstrating that the SIT Marine Atlantic did not obtain proper accreditation from ABS due to patent deficiencies in the accreditation application, including lack of drawings. Saudi maintains that negligence in the maintenance of the vessel or its remanufacture is not solely governed by or determinable by the regulations or protocols of ABS, Lloyd's, and other societies.

In response Defendants argue that the exceptions and objections constitute a late-filed, supplemental response to their motion to strike that seeks to relitigate issues already decided.[5] Defendants highlight the fact that Saudi had ample time to submit evidence supporting his experts' qualifications and opinions timely, to ask about their opinions during their depositions in the fall of 2000, and to meet the October 2, 2000 deadline to submit expert reports. Although Defendants filed their motion to strike on December 14, 2000 and Saudi responded on January 8, 2000, he failed to attach any affidavits to that response, did not request a Daubert hearing, and did not ask for an extension of time to submit affidavits or other documents. They therefore request the Court to adopt the magistrate judge's memorandum and recommendation and to strike Mahmoud and Saudi as expert witnesses.

Contrary to Saudi's representations, Defendants insist that they did not "hoodwink" the Court or cite testimony out of context. Rather, attached to their motion to strike is a complete copy of the deposition of Mahmoud and a complete copy of the second day of Saudi's deposition testimony, which addressed the expert witness issues.

Defendants contend that the newly submitted affidavits are untimely. They are also self-serving and have not been subjected to cross-examination. Saudi should have asked relevant questions of these expert witnesses during their depositions to bring out the information. Because Defendants now do not have an opportunity to cross examine the witnesses, Defendants claim they are prejudiced, especially in light of the fact that the discovery deadline and the deadline for submitting expert reports have passed, that the new affidavits are merely efforts to file late expert reports which Defendants could not review before timely submitting their own expert reports, and Defendants had already deposed these witnesses. They move to strike the affidavits attached to Saudi's objections and exceptions from the record.

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[5] Actually, Magistrate Stacy's memorandum and recommendation is exactly what it is titled, and does not become a decision of the Court unless and until the Court approves of and adopts her findings and conclusions. Nevertheless, the Court agrees that the arguments should have been timely presented to her.

Furthermore, given the lack of logic in refusing to recognize that any number of events between the test in December 1998 and the failure of the crane five months later could have contributed to that collapse, Defendants maintain that the magistrate judge correctly ruled that there is no reliable basis for Mahmoud's speculative opinion that the December 1998 weight test did not take place. They submit a copy of the "Cargo Gear Statement of Fact Survey" for the Marine Atlantic, dated December 31 1998 and reflecting the testing was done that month. Ex. 1. Moreover, they insist that Mahmoud did apply the wrong corrosion rate to the metal coupling at issue. The portside of the crane was always located on the main deck of the vessel and was never submerged in salt water. Yet the following was said during his deposition:

> Q. But the rate that you relied upon in your report
> was based on the metal being submerged

in seawater?

A. That's fine, yes.

Ex. 2 to motion to strike, at p. 130, 11. 22-25. The corrosion graph that he presented at his deposition was entitled, "Effect of velocity on corrosion of steel by seawater at ambient temperatures." Ex. 2 to Defendants' response (#263). During his deposition his testimony demonstrates that the graph referred to metal submerged in salt water:

> The graph shows corrosion rates of steel and seawater as a function of velocity, if the seawater is stagnant or moving at whatever speed. As it shows in the "x" axis and the velocity, the Y axis is corrosion rate in mils per year. And as it shows, as the velocity increases, the corrosion rate increases.

Id. Thus because the testimony about the rate of corrosion is erroneous, his conclusions about corrosion rates are not reliable. Mahmoud did not present any proof of corrosion rates other than those relating to the submersion of metal in salt water.

Moreover, in Mahmoud's new affidavit he concedes, "Dr. Mahmoud never stated he is a crane maintenance expert, nor a crane inspector." Defendants find this admission contrary to what he stated in his expert report ("I am familiar through experience with the inspection of lifting cranes.") and to Saudi's arguments in his exceptions and objections. Thus the magistrate judge did not err in concluding that Mahmoud is not a crane maintenance or inspection expert, insist Defendants.

They also maintain that the magistrate judge correctly concluded that Saudi, himself, was not an expert in the areas he claimed. His new, untimely affidavit, which was not filed as an expert report nor in opposition to their motion to strike expert witnesses, is self serving and has not been subjected to cross-examination, thus prejudicing them in the same ways as Mahmoud's, Defendants urge. During his deposition, Saudi was questioned about his knowledge of the ABS regulations, the ISM Code, and his lack of expertise regarding maintenance issues, and he did not mention these latest opinions. Ex. 1 to motion to strike expert witnesses. His deposition testimony reveals that he does not have the expertise to testify about the ABS regulatory requirements despite his arguments in his exceptions and objections, but relied on what he was told by ABS surveyors. Ex. 1 to the motion to strike, p. 252, 11. 8-20. Saudi further testified that he had never worked for ABS, had never had formal training in ABS rules and regulations, and could not remember the last time he looked at the ABS manual pertaining to crane inspections and could not remember its title or reference. Id. at p. 418, 11. 3-11; p. 309, 1. 15—p. 310, 1. 19. He also conceded that he "did not read, really, their regs, explicit specifications and I cannot claim that I am an expert about it." Id. at p. 257, 11. 5-7.

Saudi's newly submitted affidavit represents that he is an expert about the International Safety Management ("ISM") Code, even though he claimed no such expertise during his deposition, during which he erroneously calls the ISM the "International

Safety Measurement" Code, was in the following exchange:

> Q. And where does that requirement come from? A. This is, this is a requirement from, I guess, the safety measurements of ISM, if I under stand right, International Safety Measurement Q. You guess? A. I am guessing, yes. I don't know exactly where it came from. But I know that there is a certificate that was not there. Q. But you are not sure what requires that? A. No, I am not sure which authority requires that exactly.

Ex. 1 to the motion to strike, at p. 299, 1. 18—p. 300, 1. 3. The new affidavit also refers to maintenance requirements, suggesting Saudi is an expert in that area. Yet during his deposition, the following was asked:

> Q. And you don't hold yourself out as a crane maintenance expert, correct? A. No I do not. No I am not.

Id. at p. 433, 1. 24—p. 434, 1.1.

For these reasons, Defendants ask the Court to deny Plaintiff relief and uphold the magistrate judge's recommendations.

The Court has reviewed the record de novo, including the deposition testimony submitted. Based on the record that was before Magistrate Judge Stacy when she issued her memorandum and recommendation, the Court fully agrees with her findings and conclusions. Moreover, the Court concurs with Defendants that the new affidavits should be stricken. Not only would they greatly prejudice Defendants at this stage of the litigation, but the inconsistencies between the affidavits and deposition testimony have not been explained by Plaintiff.[6] Because the self-serving affidavits contradict Saudi's and Mahmoud's sworn statements during their depositions, without any explanation, no less a logical or persuasive one, the affidavits are incompetent evidence and have not been considered by the Court in determining whether the expert's testimony is reliable. S.W.S. Erectors Inc. v. Infax, Inc., 72 F.3d 489, 495 (5th Cir. 1996); Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136 n.23 (5th Cir. 1992); Albertson v. T.J. Stevenson & Co., 749 F.2d 223 (5th Cir. 1984) (rejecting sworn statement of affiant when it contradicted affiant's earlier deposition testimony). The Court accordingly overrules Saudi's objections and exceptions, adopts the magistrate judge's findings and conclusions as its own, and grants Defendants' motion to strike expert testimony to the extent indicated.

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[6] Although the motion before the Court is not one for summary judgment, the same concerns make the evidence here incompetent. Where a plaintiff attempts to raise a fact issue by relying on statements in his affidavit that contradict his earlier sworn deposition testimony, the affidavit is not competent evidence and should be disregarded. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495 (5th Cir. 1996)("It is well settled that this court does not allow a party to defeat a motion for summary judgment using an affidavit which impeaches, without explanation, sworn testimony."); Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136 n.23 (5th Cir. 1992) (holding that plaintiff's affidavit contradicting his previous deposition could not defeat defendant's summary judgment); Perma Research & Dev. Co. v. Sinqer Co., 410 F.2d 572, 578 (2d Cir. 1969) (granting summary judgment for defendant, disregarding plaintiff's affidavit because plaintiff had never before made the specific factual allegations stated in the affidavit, despite having been asked several times during his deposition to specify the allegations that supported his claim).

MOTIONS FOR REHEARING

The Court next addresses the motions for rehearing.

A. Instrument #242

Plaintiff's moves for rehearing (#242) of the Court's order of December 15, 2000 (#224) granting summary judgment to Defendants Marine Atlantic, Ltd., Osprey Ship Management ("Osprey"), Marine Transport Corporation ("MTC"), Marine Transport Lines,. Inc. (MTL"), and Koch Shipping, Inc. ("Koch") on Plaintiff's claims for punitive damages (#224), which the Court concluded are not recoverable against Defendants under maritime law. Saudi argues that punitive damages are allowed and are supported by factual evidence of gross negligence or intentional conduct. To establish the applicability of punitive damages here, he refers to the testimony of Richard Farman, involved in the remanufacture /refurbishing of a portside hose handling the crane, who never broke the crane down to inspect all of its pieces before releasing it for use by the owners or managers of the S/T Marine Atlantic as remanufactured/refurbished; to "new evidence" from the deposition of Osprey Acomarit Services Maritimes, S.A. 's ("Osprey-Acomarit's") employee, Tom Garrett, that Osprey-Acomarit failed to lubricate properly the spline and coupling on the crane, even though there was a diagram of the crane in the on-board manual in the Chief Engineer's office; and to Dr. Salah Mahmoud's affidavit and deposition testimony stating that the lifting survey that allegedly occurred in December 1998 (five months before the crane failed while lifting Plaintiff) was never performed. Saudi also alleges that the Marine Atlantic, Ltd. crew failed to monitor that test to make sure that it was carried out. He charges that Defendants displayed "conscious disregard" for proper maintenance, supporting a finding of gross negligence. Saudi relies on In re: Amtrack Sunset Ltd. Train Crash, 121 F.3d 1421, 1429 (11th Cir. 1997) (holding that "personal injury claimants have no claim for non-pecuniary damages such as . . punitive damages, except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman, and in those very rare situations of intentional misconduct.").

In response, incorporating their earlier pleadings, Defendants note that the motion is inherently defective because it fails to include any of the evidence it references. Providing an excerpt of Tom Garrett's deposition, moreover, Defendants controvert Saudi's allegation that they consciously disregarded the lubrication of the spline gears and coupling by pointing out that Garrett testified that he assumed that there was a solid shaft through the area in question and, from his recollection after reviewing the manual in 1997, that there was no reason to believe that a spine coupling was hidden under the plating or that the coupling required maintenance of any kind. Ex. 1, p. 218, ll. 8-15; p. 274, ll. 5—p. 275, 1.3. Garrett also stated that the service manual did not indicate that any service maintenance or inspection was required for this coupling. Id. at p. 284, 11. 6 14. Furthermore, Garrett had no recollection of any specific requirements in the manual for lubricating a spline shaft for the crane at issue. Id. at 289, 11. 20-22. Although Plaintiff's purported expert, Salah Mahmoud, testified that the crane manual "spells out everything that needs to be done in terms of maintenance (ex. 2 at p. 55, 11. 14-21)," the "Instruction, Operation & Maintenance Manual" prepared by Appleton Marine does not refer to lubrication or inspection of the spline coupling as part of any maintenance requirement. Ex. 3. Moreover, MTL's representative, Richard Farman, testified that the manual was reviewed before or during the vessel's reactivation in 1994 and that he was not aware of any indication in the manual that the coupling needed maintenance. Ex. 4, excerpt of Farman's deposition, p. 23, 11. 21-24; p. 27, 11. 11-15; p. 172, 11. 17—p. 173, 1. 1; p. 181, 11. 13-19.

Defendants further observe that because this Court has previously dismissed Acomarit and Marine Atlantic Ltd. from this case, there is no longer any claim involving crew members aboard the S/T Marine Atlantic.

Defendants emphasize that there is no evidence of conscious disregard of the coupling by the vessel's crew. Even though Marine Atlantic arranged for Saudi to depose the vessel's master, chief officer, chief engineer, and crane operator, Saudi declined the opportunity.

Defendants further highlight the absence of any evidence supporting Saudi's allegation that Marine Atlantic was negligent in not requiring the breakdown and inspection of all moving parts of the crane during the reactivation of the vessel by Keppel Shipyards in Singapore in 1993. Nor does Saudi submit any evidence to support his contention of intentional wrongdoing by MTL to support a claim for punitive damages. Nor does he point to any authoritative source (law, regulation, industry standard, or manufacturer's recommendation) that requires a complete breakdown and inspection of the crane in dispute.

Defendants assert that they demonstrated in their joint motion to strike Plaintiff's experts (#220) that the "expert" testimony of Dr. Mahmoud, who admitted that he was not present at the time the ABS weight test was carried out in December 1998 and that he had no knowledge whether the test documentation had been falsified, is inadmissible; and that Dr. Mahmoud had no first-hand knowledge of the test and his opinion was accordingly stricken by Magistrate Judge Stacy. In contrast, the undisputed evidence and documentation in the case demonstrate that the weight test was performed. Ex. 5, ABS documentation of weight test.

As for Saudi's contention that he is entitled to punitive damages because Marine Atlantic Ltd. 's crew intentionally failed to monitor the weight test properly to insure that was carried out, Defendants note that again Saudi provides no supporting evidence. They also claim that the assertion is false.

Had Saudi taken the deposition of Captain Marcenaro, Marine Atlantic's master, Saudi would have discovered that Marcenaro did attend the weight test in December 1998, saw the weights applied to the crane and the crane lift the weights as the ABS survey and shipyard representatives watched.[7] Thus no factual basis supports allegations of misconduct against Defendants.

After reviewing the record, the Court agrees that Saudi has completely failed to meet his burden of proving intentional misconduct, while Defendants have controverted his conclusory allegations with evidence., Accordingly the Court denies the motion for rehearing (#242) of its earlier order.

B. Instruments #244 and #260

1. Joe Alfred Izen, Jr. and Afton Jane Izen move for rehearing or new trial (#244), with supplement (#254), on the Court's Rule 54(b) final judgment, signed on December 19, 2000 (#230),[8] awarding fees and expenses to Defendant U.S. Trust under

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[7] Defendants state that before Marine Atlantic Ltd. was dismissed from this action, it was going to preserve Marcenaro's testimony for trial through a de benne esse deposition.

[8] There are actually three orders underlying Saudi's motion. In an order dated September 5, 2000 (#159), the Court awarded U.S. Trust fees and expenses under 28 U.S.C. 1927 because it concluded that Saudi sued U.S. Trust without adequate investigation and then subsequently unreasonably and vexatiously multiplied the proceedings even after Defendant Marine Atlantic Ltd. admitted in pleadings filed in this action that it owned the vessel in dispute at the relevant time. In its order entered on December 19, 2000 (#229), based on a supporting affidavit submitted by U.S. Trust, the Court ordered the Izens, responsible as Plaintiff's counsel, jointly and severally to pay U.S. Trust $28,601.78 for reasonable

28 U.S.C. 1927, to be paid jointly by Plaintiff's attorneys, for unreasonably and vexatiously multiplying proceedings by refusing to dismiss frivolous claims against U.S. Trust disproved by evidence on file that Marine Atlantic Ltd. has owned the vessel since 1994, including in May 1999, the time of Saudi's injury. Saudi explains that the Court agreed with U.S. Trust that Saudi's claims against it were based on its alleged ownership of the vessel when Saudi was injured. Plaintiff points out that in support of Defendants' joint motion to strike Plaintiff's experts, Defendants had attached as Exhibit 3 the Expert Report of Robert Groesbeck, an ABS document that lists U.S. Trust as the owner of the M/V Marine Atlantic from 1979 until 1994. Izens' motion for rehearing or a new trial, Ex. A at p. 15. The Izens also argue that Saudi's claims against U.S. Trust were not limited to claims arising from U.S. Trust's ownership or management of the vessel at the time of Saudi's injury. As a comparison, they emphasize that the Court denied Defendants Marine Transport Lines, Inc.'s and Marine Transport Corporation's motions for summary judgment even though these Defendants never owned the vessel, but merely supervised its refurbishment in 1994. The Izens ask the Court to rehear the matter and to vacate its order of December 19, 2000

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and necessary fees and $1,718.78 for necessary costs incurred by U.S. Trust after the Izens insisted on pursuing their claims despite the fact that evidence had been filed disproving the basis of their claims against U.S. Trust. The Court then issued a Rule 54(b) judgment in favor of U.S. Trust against Saudi on all claims (#230).

awarding sanctions against them. The Court presumes that they seek vacation of #229 and 230 also.

In a supplement (#254), the Izens attach an authenticating affidavit of Joe Alfred Izen Jr., a letter (Ex. A) from Innes Mackillop, Defendants' counsel, and business records of the transaction whereby Shawmutt Bank Connecticut as "successor the United States Trust Company of New York, not in its individual capacity but solely as owner trustee under the trust agreement dated as of January 31, 1979," transferred title of the vessel S/T Marine Atlantic to Marine Atlantic, Ltd. Exhibits B-O. The Izens insist that there was no basis in the record, nor any prior basis, for requiring them to guess that the U.S. Trust Company involved in the ownership of the vessel was a company other than U.S. Trust. Moreover, these records "underscore the need which Plaintiff faced to take a deposition to determine U.S. Trust's powers (either exercised or retained) over the vessel when U.S. Trust Co. of New York became 'owner/trustee.'" Izens' motion at 2.

In response (#255), U.S. Trust objects that the Izens, in seeking a rehearing, fail to allege or offer any new evidence that the Court has not already considered and that their motion "is another attempt to draw out Trust's involvement in this lawsuit and force Trust to waste more time and money responding to meritless motions." Response at 2. U.S. Trust also points out that the motion should be stricken because the Izens have not met their certificate-of-conference obligations.

U.S. Trust argues that the Izens have not established the admissibility of the document entitled "Cargo Gear Certification and Testing" of the vessel at issue, purportedly conducted by Robert P. Groesbeck, which they keep attaching to their motions. See Ex. A to #214 for full copy. It is not based on personal knowledge, nor is it sworn to or even signed by Groesbeck, and is thus unauthenticated hearsay. Moreover, the document was supposedly created by an expert witness who has not been shown to be an expert. Furthermore, contends U.S. Trust, even if it were admissible, it fails to challenge the judgment. U.S. Trust reiterates that the evidence filed with the court conclusively disproved the basis of the three claims against them: two required U.S. Trust to have been the owner of the vessel in May 1999, which the Izens still cannot show, and the other claim required Trust to have been Saudi's employer at that time. Their motion does not contest the amount of the attorney's fees or costs awarded by the Court. Therefore U.S. Trust asks the Court to affirm its judgment and deny the Izens' motion.

U.S. Trust also contests the Izens' claim that they never limited Saudi's potential claim against U.S. Trust to its ownership or management of the vessel at the time of Saudi's injuries. The language of the complaint reflects that the claims against U.S. Trust were only filed against U.S. Trust as the owner of the vessel. Even if the Izens had not so limited their negligence claims against U.S. Trust, the controlling law does, as discussed in U.S. Trust's motion for summary judgment, pp. 2-4, and as the Court concluded.

Furthermore, the comparison of Saudi's claims against U.S. Trust with those against Marine Transport Corporation and Marine Transport Lines, Inc. is inapposite, U.S. Trust maintains. Saudi submitted some evidence that created a fact issue as to whether these other Defendants refurbished or remanufactured the crane. No evidence exists to raise a fact issue on Saudi's claims against U.S. Trust. The evidence that does exist, in contrast, disproves those claims, insists U.S. Trust. Because the Izens' conduct in failing to investigate their claims before they filed them and in refusing to dismiss them once contrary evidence was filed with the Court demonstrating that the Izens had sued the wrong party resulted in the sanctions against them, their motion for rehearing should be denied.

In a separate response (#257) to the Izens' supplement, U.S. Trust insists that the supplement lacks a certificate of conference, misstates the law, contains an affidavit in which Joe Alfred Izen, Jr. makes false statements (which U.S. Trust identifies), was filed fourteen days after Rule 59's ten-day deadline for new trial motions,[9] attaches inadmissible exhibits, is irrelevant to the reasons why the Court imposed the sanctions, and was filed without leave of court. U.S. Trust also complains that the Izens filed the supplement on January 12, 2001 and then waited until January 16, 2001 to mail a copy to U.S. Trust, in attempt to prejudice its rights. U. S. Trust asks the Court to strike the supplement from the record.

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[9] The Fifth Circuit, recognizing that Federal Rules of Civil Procedure 59 and 60 may be used to correct similar errors, applies a bright line rule: if the motion is served within ten days following entry of judgment and challenges the correctness of that judgment, it is treated as Rule 59 motion. An untimely Rule 59(e)

U.S. Trust further asserts that all the exhibits are inadmissible hearsay that should be stricken. The Izens have not laid the proper foundation for a business records exception. Moreover, the documents are incomplete and unreliable. It reiterates that the legal and factual basis of the Court's judgment remains unchallenged by any competent evidence and should be affirmed, while the Izens' motion for new trial should be denied.

In response (#260), the Izens disagree. Marine Transport Lines, Inc. and Marine Transport Corporation's response

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motion is treated as a Rule 60 if the grounds asserted would support a Rule 60(b) motion. See, e.eq., Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465, 470 (5th Cir. 1998), cert. denied, 526 U.S. 1005 (1999) ; Goodman v. Lee, 988 F.2d 619, 623 n.2 (5th Cir. 1993). Nevertheless, the grounds for relief asserted by Saudi must be allowed under Rule 60(b). To succeed on a motion based on newly discovered evidence, the movant must show that it exercised due diligence in obtaining the information (and not evidence that could have been discovered and presented at trial through the exercise of due diligence) and that the evidence is material and would have clearly caused a different result had it been admitted previously. Government Financial Services One Ltd. Partnership v. Peyton Place, Inc., 62 F.3d 676 771, 774 (5th Cir. 1995). Furthermore that new evidence must have been is existence at the time of the trial and only discovered after the trial. Id. at 771.

(#261) in turn challenges the assertions made by the Izens about its counsel as inaccurate. Instrument #261.

After reviewing the record, here, too, the Court finds the Izens' motion to be meritlous and unsupported by any competent evidence. Accordingly, the Court denies the motion for new trial.

2. In a related motion Defendant U.S. Trust's seeks sanctions and requests the Court to strike (#260) the Izens' supplement to motion for new trial (#254) and trial exhibit to their motion (#259).

Because the materials are for review solely by the Court, which can disregard those submissions that are inadmissible, irrelevant, frivolous, or factually incorrect, the Court denies the motion to strike.

C. Instrument #245

Plaintiff moves for rehearing (#245) on order signed on December 15, 2000 (#222) granting summary judgment to Defendants Koch Shipping, Inc. and Koch Supply & Trading Company Ltd. on all claims against them. Because the Court finds Plaintiff's arguments to be redundant and without merit, and because it stands behind its previous ruling, it denies the motion for rehearing.

D. Instrument # 246

Plaintiff moves for rehearing (#246) of the Court's memorandum and order dated December 21, 2000 (#237) dismissing

Marine Atlantic Ltd. for lack of personal jurisdiction under both Fed. R. of Civil P. 4(K)(2) and the Texas long-arm statute. Plaintiff complains that when Robert Hamshaw appeared for his noticed deposition on November 10, 2000, he failed to produce corporate documents regarding his power to act on behalf of Marine Atlantic Ltd. Moreover, his attorney stated that Hamshaw was appearing "in his personal capacity" and was not to answer certain questions regarding Monte Cristo Holdings .("Monte Cristo"), identified by Plaintiff as the corporate owner of Marine Atlantic Ltd.), or Monte Cristo's shareholders. Plaintiff insists that Hamshaw "displayed an alarming lack of recall which could be alleviated solely by placing documents in front of him to refresh his memory." #246 at p. 7. After the deposition, Saudi moved to compel Hamshaw's production of certain documents under a subpoena. duces tecum.

Plaintiff then moved to compel resumption of the deposition, but Judge Stacy upheld an objection by Marine Atlantic Ltd. After reviewing the transcript of Hamshaw's deposition, this Court found that there was no basis for the exercise of personal jurisdiction.

Saudi argues that the Court should have compelled Hamshaw to produce Marine Atlantic Ltd.'s records empowering Hamshaw to act as its assistant secretary. Saudi asserts that Hamshaw stated in his deposition that the records were in the hands of Monte Cristo's CEO, who allegedly offices in Bermuda.

Saudi charges the Court with reversible error in limiting relevant discovery. He also claims the Court erred by refusing to compel the resumption of Hamshaw's deposition. He objects to the Court's sealing of information reviewed by the Court in camera regarding the financial ownership of Monte Cristo, and indirectly of the S/T Marine Atlantic. He particularly emphasizes the failure of Defendant to produce the closing binder for the original sale of the vessel in 1994 to Marine Atlantic Ltd. from whatever company owned it previously.

Saudi further argues that Greg Doyle's deposition[10] shows the Court has personal jurisdiction over Marine Atlantic Ltd. He claims Marine Atlantic Ltd. acted through Doyle and his one-man corporation, Salisbury House, Inc. Ex. B, Doyle Dep., at pp. S1-53 (Hamshaw's connection with Marine Atlantic Ltd. was as an assistant secretary who once negotiated an agreement with Doyle and Salisbury House, Inc.).[11]

In response, Marine Atlantic Ltd. incorporates its original motion to dismiss for lack of personal jurisdiction (#162), its reply to Saudi's response to that motion (#177), and its response (#221) to Saudi's motion to compel resumption of Hamshaw's deposition and production of documents, in which it demonstrated that it does not do business in Texas and is not subject to either specific or general jurisdiction here. It also notes that Saudi never perfected service of process on it. See Court's Order of August 31, 2000, entered Sept. 5, 2000 (#159)

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[10] Doyle had previously worked for Marine Transport Lines or M.T.L. Tankers.

[11] Although Plaintiff cites numerous other pages, the Court finds they are irrelevant to its personal jurisdiction over Marine Atlantic Ltd.

In seeking rehearing of the personal jurisdiction issue, Saudi relies on the excerpts of the depositions of Hamshaw and Doyle. In its order of December 21, 2000 (#237), dismissing Marine Atlantic Ltd., the Court stated that it had reviewed the transcript of Hamshaw's deposition. In the instant motion Saudi submits for the first time extracts from Doyle's deposition, which was taken on November 30, 2000 and was available for submission to the Court before it rule originally. Thus Doyle's deposition is not "newly discovered" evidence, argues Marine Atlantic, Ltd., and should not be considered with the motion for rehearing. The Court agrees and refers the parties to footnote 9 of this memorandum and order. Even if the Court does consider the Doyle excerpts, Marine Atlantic maintains that the extracts do not prove the existence of contacts between Marine Atlantic Ltd. and the United States sufficient to support Rule 4(k)(2) jurisdiction.

Marine Atlantic Ltd., complaining of Saudi's "factual inaccuracies, exaggerations and borderline libelous comments,"[12] also challenges Saudi's version of the facts in his motion. At

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[12] As an example it points to Saudi's completely unsupported accusation that Julio Santo Domingo, "a Columbian gentleman... who owns controlling interest in Monte Cristo," was "engaged money-laundering of drug profits."

Hamshaw's deposition, which was taken on November 10, 2000 by agreement, Marine Atlantic Ltd. quotes another agreement of the parties reached during the deposition, Ex. 2 at p. 17, 1.17—p. 18, 1. 6.:

> Mr. Nork[13]: So we can agree, any questions you want to ask, please ask. I'll make the same objection I just made and I'll ask madame court reporter to certify this question or make a mark on this question. I think the most expeditious way to resolve this is Mr. Hamshaw can furnish the answers later to the best of his knowledge and we will furnish them to the Court in camera so she can decide whether they are relevant.
>
> Mr. Izen: And they will be there for appeal. That's fine by me.

During the deposition Hamshaw declined to answer two questions: (1) "Who were the investors you were representing?" (Ex. 2 at p. 17, 11. 5-6); and (2) "Does (Julio Mario Santo Domingo] have anything to do with financing vessels or any interest in any vessels that you know of?" (Id. at p. 61, 11. 13-13). According to the parties' agreed procedure, the Court in camera reviewed an affidavit filed by Hamshaw answering the questions and concluded in its order of December 20, 2000 that there was no valid basis for ordering resumption of his deposition or disclosure of the contents of Hamshaw's affidavit because the contents would not help Plaintiff demonstrate personal jurisdiction over Marine Atlantic Ltd.

Nor insists Marine Atlantic Ltd. did the Court commit irreversible error by refusing to order Hamshaw to produce the documents Saudi seeks. Marine Atlantic Ltd. points out that the deposition notice with a purported subpoena duces tecum, received by Hamshaw on November 6, 2000, did not notice Hamshaw as a corporate representative of Marine Atlantic. The Court's order of December 20, 2000 clearly stated, "Hamshaw, who was not deposed as a corporate representative of any of the Defendants, cannot be compelled to provided documents which are neither in his possession nor under his control." Thus the subpoena duces tecum was. not enforceable. Marine Atlantic Ltd.-alternatively argues that if Hamshaw was a party deponent, he had thirty days to respond to the subpoena, which would have extended the production date beyond the discovery deadline. Furthermore, it notes, the majority of the documents were first demanded in Saudi's motion to compel on December 1, 2000, the last day of discovery. The Court's order on December 20, 2000 stated, "To the extent Plaintiff seeks documents with the foregoing motion which were not identified in the subpoena duces tecum to Hamshaw, such document requests come too late, on the expiration of the discovery deadline."

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[13] Counsel for Marine Atlantic Ltd.

Furthermore, insists Marine Atlantic Ltd., Doyle's deposition transcript does not demonstrate that he was an agent of Marine Atlantic Ltd. located in the United States. Outside of the single instance when Doyle was involved in executing a contract between Salisbury House and Marine Atlantic, Ltd, Saudi presents no evidence that any work by Doyle pursuant to that contract occurred in the United States or that Doyle's work under that contract, if any, was other than work typically undertaken by an independent contractor. Saudi has presented no evidence of any agency relationship between Doyle and Marine Atlantic Ltd. Although Saudi tries to show, as a contact of Marine Atlantic Ltd. with the United States, work performed by Doyle in negotiating shipyard contract issues relating to the Marine Atlantic when Doyle was employed by M.T.L. Tankers in Singapore, that work occurred years before Doyle started Salisbury House, Inc. in Massachusetts. Ex. 3, Doyle Dep. at p. 140, 11. 13-18; p. 141, 1. 7—p. 142, 1. 25; p. 44, 11. 6-10. Doyle testified that when he negotiated the shipyard contract in Singapore, he did not have a contract with Marine Atlantic and that he did not think he had specific authority to negotiate for Marine Atlantic Ltd. Ex. 3, Dep. of Doyle, at p. 149, 1.15—p. 150, 1. 8. Furthermore, that negotiation in Singapore occurred while Doyle worked for a different company. Thus Saudi fails to show that Doyle acted as an agent for Marine Atlantic Ltd. in the United States and thus fails to support Rule 4(k)(2) jurisdiction.

After reviewing the record, the Court finds itself in complete agreement with Marine Atlantic Ltd. and thus denies the motion for rehearing.

E. Instrument #265

Plaintiff has filed cross motion for sanctions (#265) against U.S. Trust. Because, as indicated above, the Court has rejected his arguments in the above motions, and because the Court finds there are numerous misrepresentations in that motion for sanctions, the Court denies the cross motion for sanctions.

F. Instrument #266

Defendants Acomarit Services Maritimes S.A. ("Acomarit"), Marine Atlantic Ltd., and Osprey Ship Management Inc-.'s motion for entry of final judgment ..(#266.).) under Rule 54(b) states that it is opposed, but no opposition has been filed. The Court has dismissed both Acomarit and Marine Atlantic Ltd. for lack of personal jurisdiction. It has also, in two separate orders, granted Osprey summary judgment on Plaintiff's Jones Act, unseaworthiness, and common-law and maritime negligence claims.

Because trial is imminent on the few remaining claims, and therefore a complete final judgment will issue in the near future, the Court denies the motion.

In sum the Court

ORDERS the following:

(1) All Plaintiff's and the Izens' motions for rehearing (#242, 244, 245, and 246) are DENIED;

(2) Plaintiff's cross motion for sanctions (#265) is DENIED;

(3) Defendants Acomarit Services Maritimes S.A. ("Acomarit"), Marine Atlantic Ltd., and Osprey Ship Management Inc.'s. motion for entry of final judgment (#266) under Rule 54(b) is DENIED; (4) Defendant U.S. Trust's motion for sanctions and to strike (#260) the Izens' supplement to motion for new trial and trial exhibit to their motion is DENIED and (5) the Court hereby ADOPTS the magistrate.. judge's memorandum and recommendation (#262) as its own, OVERRULES Plaintiff's objections and exceptions to #262, and GRANTS in large part Defendants' joint motion to strike (#220) Plaintiff's expert witnesses, as indicated above and in the magistrate's memorandum and recommendation (#262).

SIGNED at Houston, Texas, this 23rd day of July, 2001.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS
S/T MARINE ATLANTIC, He Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In United States Courts Rem), MARINE ATLANTIC, LTD., Southern District of JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- Michael N. Milby, Clerk of Court APPLETON, INC., APPLETON MACHINES CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, is Defendant Osprey Ship Management, Inc.'s

("Osprey's")[1] motion for summary judgment (#151).

The movant seeking a federal summary judgment initially must inform the court of the basis for its motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfq. Co., 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which it bears the burden of proof at trial. Fed. R. Civ. P 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. It meets this burden only if it shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment Id. at 252.

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[1] Incorrectly sued as Osprey Acomarit Ship Management, Inc.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, he "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by his own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825 (1992) . The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. Salis v. Carpenter., 908 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

Pleadings are not summary judgment evidence. Wallace v. Texas Tech University, 80 F.3d 1042, 1046 (5th Cir. 1996), citing Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc.).

In his fourth amended complaint (#189), the controlling pleading at this point, Plaintiff has sued osprey, along with employee, Tom Garrett), as functioning I as the alleged manager charged with acting through their common "general agent" and and/or operator of the vessel, S/T Marine Atlantic, for general negligence under maritime and common law.[2] The fourth amended complaint asserts that Tom Garrtt entered into an agreement with Acomarit Services Maritimes, S.A. under which Acomarit Services Maritimes, S.A would "reimburse" Osprey-Acomarit Ship Management, Inc. for its payment of Garrett's salary.

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[2] Plaintiff's fourth amended complaint eliminated an earlier claim against Osprey under the Jones Act. A seaman can only recover against his employer for causes of action based on the Jones Act. Cosmopolitan Shipping v. McAllister, 337 U.S. 783, 791 (1949); Ex. E, Affidavit of William B. Gibbs. Saudi conceded that he was not an employee of Osprey at the relevant time and thus the Jones Act claim was barred as a matter of law. Relating to the claim for negligence under maritime law, only the M/T Marine Atlantic's owner, manager or operator can be liable for unseaworthiness of the vessel. Daniels v. Florida Power & Light Co., 317 F.2d 41, 43 (5th Cir. 1963) (to be liable for breach of warranty of seaworthiness, a defendant "must be in the relationship of an owner or operator of a vessel"), cert. denied, 375 U.S. 832 (1963); Baker v. Raymond. Int'l, Inc., 656 F.2d 173, 181-82 (5th Cir. 1981). The complaint alleges that Osprey and Acomarit Services Maritimes, S.A. "are believed to have managed and/or operated" the S/T Marine Atlantic "through their common agent and employee, Tom Garrett." The complaint's third, fourth and fifth causes of action, for breach of warranty of merchantability, strict liability in tort, and an action in rem against the ship, respectively, are not complaint asserts that Tom Garrett entered into an agreement with Acomarit Services Maritimes, S.A. under which Acomarit Services Maritimes, S.A. would "reimburse" Osprey-Acomarit Ship Management, Inc. for its payment of Garrett's salary.

Osprey moves for summary judgment on the general negligence claims, which charge Osprey with breach of the duty to use reasonable care and observe the standard of competence in the marine industry in inadequately maintaining the ship and failure to make the M/T Marine Atlantic a safe and seaworthy vessel. To prove negligence under general maritime law, a plaintiff must demonstrate (1) a duty owed to the plaintiff by the defendant; (2) breach of that duty; (3) injury sustained by the plaintiff; and (4) a causal connection between the defendant's conduct and the plaintiff's injury. In re Cooper/T. Smith v. Gnots-Reserve, Inc., 929 F.2d 1073, 1077 (5th Cir. 1991) . Under negligence law, a tortfeasor is

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asserted against Osprey.

The fourth amended complaint also alleges, as a sixth cause of action, "a special plea of res ipsa loquitur" against all Defendants. The doctrine, which is applied in admiralty as well as tort, is not a rule of law, but purely a rule of circumstantial evidence that aids an injured plaintiff in making a prima facie case permitting an inference of negligence by the defendant to be drawn under specified circumstances, i.e., the accident must be of a kind that ordinarily does not occur in the-absence of someone's negligence, it must be caused by an agency or instrumentality within the exclusive control of the defendant, and it must not have been due to any voluntary action or contribution on the part of the plaintiff. See, e.q., Curry v. Chevron USA, 779 F.2d 272, 275 (5th Cir. 1985); Geotechnical Corp. of Del. v. Pure Oil Co., 196 F.2d 199, 205 (5th Cir. 1952), cert. denied, 344 U.S. 874 (1952) ; Prosser on Torts 42 (1955). Thus it need not be pled as a separate cause of action in the complaint. Duqas v. Kansas City Southern Ry. Lines, 473 F.2d 821, 825 (5th Cir. 1973), cert. denied, 414 U.S. 823 (1973).

liable for breach of a duty only to those to whom it owes such a duty. Consolidated Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65, 67 (5th Cir. 1987). Osprey maintains that it was neither Plaintiff's employer nor the M/V Marine Atlantic's owner, manager or operator, as evidenced by the affidavit (Ex. A) ("Captain Sheriff Saudi was not an employee of Osprey Ship management, Inc. at the time of the occurrence made the basis of the referenced case [May 17, 1999], nor at any other time.") and deposition (Ex. S, p. 81, 1. 22 through p. 84, 1. 20) of Captain William B. Gibbs, President of Osprey. Because Osprey was not Plaintiff's employer nor the owner, manager or operator of the M/V Marine Atlantic, it owed no duty to Plaintiff. Exs. A, Affidavit of William B. Gibbs, and B, Gibbs' Dep. at p. 81, 1. 22—p. 84, 1.20. Saudi responds that there is a fact issue as to whether Osprey, through its former employee, Tim Garrett, managed or operated the fleet of Acomarit Maritime Services,3 including the S/T Marine Atlantic, and therefore had the responsibility to insure that the vessel was seaworthy and the portside crane was properly maintained and not defective. Saudi suggests that a clandestine relationship existed between Osprey and Acomarit. Saudi claims

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[3] Saudi represents that Acomarit, which was dismissed for lack of personal jurisdiction, has admitted that it was the manager of the S/T Marine Atlantic. He alleges that Acomarit and Osprey both employed Garrett as their general agent to attend to Acomarit's ships in ports in North and South America, including in the United States. Saudi further alleges that Osprey entered into an agreement with Acomarit by which Acomarit would "reimburse" Osprey for paying Garrett's salary.

that American Automar owned Osprey Ship Management as a joint venture with Acomarit Holdings, Ltd. and owned a majority of Osprey's stock. He alleges that Osprey agreed to take on Garrett as Acomarit's clandestine employee when the joint venture was formed on June 1, 1994. Ultimately, American Automar repurchased all of Acomarit Holdings' shares in Osprey and became the 100% owner of Osprey. After detailing what Saudi characterizes as a series of "fraudulent nondisclosures and discovery abuse" by Osprey and Acomarit, Plaintiff states that pursuant to a subpoena duces tecum served on Osprey, a letter dated December 15, 1998 was produced by Gibbs, written by Giorgio P. Sulser, Acomarit's Group Chief Executive, employed by Acomarit Services Maritimes, S.A. The letter indicates that Garrett would provide "service to the Acomarit group on a cost reimbursable basis plus an administrative fee of $400 per month." Affidavit of Joe Alfred Izen, Jr., Ex. B; Dep. of Captain William Gibbs at p. 29, 11. 1-13, Ex. C. Saudi also cites to the deposition of Captain Gibbs to show that Osprey kept Garrett on the payroll and on its staff until March 1, 1999, less than two months before Saudi's injury, because Acomarit wanted Osprey to do so, and that Acomarit basically had control over its "clandestine employee." Saudi maintains that Garrett attended[4]

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[4] "Attending" involves physical presence of the attending captain or port captain on the vessel and includes such duties as assisting during major oil inspections, port stay control inspections, ISM internal audits, etc. Garrett Dep. at 65-66. When he was attending, however, no one on the vessel would report to him because he "had no authority or responsibility aboard the vessel." Id. at 67.

Acomarit's ships while they were in United States ports according to Acomarit's instructions while Osprey "pretended" that Garrett was Osprey's employee. Saudi asserts that under the law of implied and apparent agency, if Garrett had the power or authority to control the management of the S/T Marine Atlantic for his principal and secret employer, Acomarit, then co-employer Osprey is liable for Garrett's negligent acts or failure to act. Restatement (Second) of Agency 7, B, BA, and 257; In re Atlantic Financial Management, Inc., 784 F.2d 29, 31-32 (1st Cir. 1986) (discussing liability under agency theories of express or implied authority, apparent authority, and respondeat superior), cert. denied sub nom. AZL Resources, Inc. v. Margaret Hall Foundation, Inc., 481 U.S. 1072 (1987).[5] Saudi also alleges liability against Osprey under the doctrine of respondeat superior. Saudi claimed that he needed more discovery to determine whether Osprey is liable for Saudi's injuries based on failure to warn, negligent maintenance of the crane, and/or unseaworthiness.

In reply, Osprey emphasizes that uncontroverted evidence exists in the record that Osprey did not own, operate or manage the vessel Marine Atlantic, which precludes the unseaworthiness claim, and that Osprey did not owe any tort duty to Plaintiff, thereby eliminating the negligence claim. Consolidated Aluminum Corp. v. C.F. Bean Corp., 833 F.2d 65, 67 (5th Cir. 1987)("a tortfeasor is accountable only to those to whom a duty is owed"), cert. denied, 486 U.S. 1055 (1988). No evidence exists to demonstrate that Garrett served as the vessel's operator or manager on behalf of Osprey, insists Osprey. As Osprey argued in its motion, Gibbs clearly testified during his deposition that Garrett had no duties with respect to running Osprey's business, did nothing for Osprey, did not attend meetings of Osprey's corporate directors, and did not vote on any Osprey business. Gibbs further testified that Osprey Ship Management Inc., before and after its name change,[6] had no relationship with or operational or management responsibilities for the vessel Marine Atlantic nor any ownership interest in the vessel. Nor has Saudi presented any evidence of misrepresentation or negligent conduct by Garrett or tortious conduct by Osprey to support his agency theory. Because Saudi has offered no competent summary judgment that Osprey or anyone acting on its behalf committed any tort in this case, he has not raised any genuine issue of material fact for trial. Those exhibits Saudi did submit do not controvert Osprey's evidence that it did not own, operate or manage the Marine Atlantic.

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[5] Osprey objects that this case deals with a Securities Act misrepresentation and is not relevant here.

Judge Stacy subsequently extended the discovery deadline to December 21, 2000 to give Plaintiff an opportunity to try to obtain employment records of and to depose Garrett. This Court thereafter ordered Plaintiff to respond to Osprey's motion for summary judgment no later than December 27, 2000.

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[6] Osprey Ship Management, Inc. was formed in January 1993. Through a shareholder transaction in June 1994, it changed its name to Osprey-Acomarit. On December 31, 1998 in another shareholder transaction it again became known by its former name. Dep. of Captain William Gibson, President of Osprey, Ex. B at 81 (#151).

After taking Garrett's deposition, Plaintiff filed a supplement to his response (#243). Saudi points to parts of Garrett's deposition testimony that Saudi argues demonstrate that Garrett was an employee of osprey, paid by osprey, when he attended Acomarit-managed vessels, including the Marine Atlantic, in ports in the United States and elsewhere. Saudi argues that as Port Captain, Garrett was responsible for insuring cargo safety and safe operation associated with cargo handling aboard the vessels he attended, which included the Marine Atlantic. The evidence shows that Garrett visited the vessel Marine Atlantic three or four times and that he performed a safety inspection and test of both cranes on the Marine Atlantic in 1997. Saudi argues that based on the facts admitted by Garrett, Osprey is liable for Garrett's action under the Restatement (Second) of Agency 7, 8, 8a, and 257 and under the Restatement (Second) of Torts 324(a), which provides that one undertaking an act or duty, here inspection, must do so competently.

In a sur-reply (#248), osprey complains that the eighty-two, separately numbered paragraphs in Saudi's supplement do not relate to Osprey, circumvent the Court's order of September 5, 2000, at pp. 37-38 (#159), barring argument about Acomarit Services Maritimes, S.A., impermissibly attempt again to introduce evidence to support Saudi's rejected claim that U.S. Trust Corporation owns the vessel, assert claims that are exclusively against Marine Transport Lines, and, most significantly, fail to identify or implicitly raise a genuine issue of material fact regarding Osprey's alleged management of the vessel. Saudi fails to adduce a single fact that shows that Osprey owed a duty to Saudi or that Garrett's activities in January 1997 legally or proximately caused the crane's failure in May 1999.[7]

With regard to specific statements in the supplement, Osprey inter alia points out that Saudi's injury did not occur was the area of Garrett's supervisory job performance; instead it occurred after cargo operations had been suspended. Ex. 1, excerpt from deposition transcript of Saudi, p. 113, l. 17 through p. 114, l. 18. Garrett's admission that as port captain he oversaw cargo handling, loading, discharging and safe operation regarding cargo handling does not establish that Osprey, through Garrett, had an obligation to detect every deficiency in equipment aboard the vessel, or that Osprey owed a duty to Saudi in May 1999 for a vetting inspection like that Garrett participated in January 1997 on behalf of oil majors, which were not time charterers of the vessel at the time of the incident. Garrett never warranted his work to the oil major on whose behalf the 1997 vetting inspection was done, never warranted or certified the crane as meeting any particular standard, and it was not his duty to do so since the oil major had its own vetting inspector present. In the intervening two and one half years between that inspection and the incident giving rise to this suit, many things could have intervened and changed the crane's condition. Saudi has failed to provide proof of proximate cause to demonstrate that Garrett's actions in 1997, even if performed on behalf of Osprey, were causally connected to the crane's failure on May 17, 1999. Saudi has insinuated that Garrett was concealing Osprey's alleged link with Acomarit and the SIT Marine Atlantic in asserting, "Despite the fact that he attended Acomarit managed vessels as Port Captain on Osprey-Acomarit time, while he was being paid as Osprey's employee, Garrett claimed Osprey-Acomarit had no connection with the Marine Atlantic." Osprey points out that Garrett's deposition testimony made clear that he worked "as an outside consultant that attended vessels for a variety of reasons, and consulted with the vessel's staff to instruct them in oil major vetting procedures, ISM systems etc., but that Osprey-Acomarit and Acomarit Services Maritimes did not control or supervise that consulting work. Ex. 2, Garrett Dep., pp. 312-13.

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[7] Osprey quotes the Fifth Circuit in Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 649 (5th Cir. 1992) :

> Under the general maritime law, a party's negligence is actionable only if it is a "legal cause" of the plaintiff's injuries. See Chavez v. Noble Drillinq Corp., 567 F.2d 287, 289 (5th Cir. 1978) _ "[L]egal cause is something more than 'but for' causation, and the negligence must be a 'substantial factor' in the injury." Thomas v. Express Boat Co., 759 F.2d 444, 448 (5th Cir. 1985) (citations omitted). The term "substantial factor" means more than "but for the negligence, the harm would not have resulted." Spinks v. Chevron Oil Co., 507 F.2d 216, 223 (5th Cir. 1975); see also Chisholm v. Sabine Towing & Transp. Co., 679 F.2d 60, 63 (5th Cir. 1982).

Saudi seems to be charging that, given Osprey's history as a joint venturer with Acomarit Services Maritimes,[8] Acomarit Services employed Garrett but arranged clandestinely for Osprey to pay his wages as its employee. Moreover, he argues that Osprey through co-employee Garrett's actions as a port captain attending vessels, including vessels owned by Acomarit entities around the world, in essence also managed and operated those including the M/V Marine Atlantic, and is thus liable to Saudi for negligence.

The Court has reviewed the record particularly Saudi's supplement and Garrett's deposition testimony, in detail, to determine what the evidence demonstrates regarding Garrett's factual and legal relationship to Acomarit Services Maritimes, Osprey, and Plaintiff. It finds that the deposition testimony indicates the following.

Garrett worked for Osprey-Acomarit for almost five years from May 1, 1994 until February 28, 1999. Garrett Dep. at pp. 119, 43. During that time he acted mainly as an outside consultant for other client companies. Id. at 33.-34. In that capacity he trained seamen on other vessels, including some of the Acomarit group,[9] and performed general surveys, International Safety Management ("ISM")[10] audits, and attending during oil major vetting inspections.[11] Id. at 35-36. The audits were at the request of and for the benefits of these outside companies, and not for the benefit of Osprey-Acomarit. Garrett Dep. at pp. 40-41.

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[8] Acomarit owned no vessels but was strictly a managing company managing vessels owned by other Acomarit-related companies and attended by Garrett on Acomarit's behalf. Garrett Dep. at 88.

In his job for Osprey-Acomarit he was classified as "Group Port Captain," the group being made up of Osprey-Acomarit and other companies. Id. at 43, 108. As Group Port Captain his "responsibility was to oversee the cargo handling, loading, discharging and safe operation associated with cargo handling."

Id. at 25. He did not "physically handle the cargo" or load or discharge cargo. Id. at 27.

Garrett was emphatic that "Osprey-Acomarit had nothing to do with the management of the vessels that I attended [as Port Captain]. Osprey had nothing to do with the day-to-day operations or the ISM system established aboard any of those vessels." Id. at 87, 63. In particular, regarding the M/V Atlantic Marine, which he visited as Group Port Captain, Garrett stated that he knew its operator was not Osprey-Acomarit. Id. at 63. He also emphasized,

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[9] The Acomarit group included Acomarit Services Maritimes, Acomarit U.K., Acomarit Singapore, Acomarit Hellenic, and Acomarit Cypress.

[10] ISM is an international standard. As ISM audit reviews management procedures aboard a vessel to determine whether those procedures comply with these standards. Id. at 39, 87.

[11] Oil vetting inspections are made by oil companies of other entity's vessels. Id. at 41. Garrett testified that he, himself, did not do the actual oil vetting inspections while he was employed by Osprey-Acomarit.

> "... I was not involved in the day-to-day maintenance or operation of the vessel. I attended for a very small period of time, at very irregular intervals, and was not involved in the direct superintendency of the vessel." Id. at 150.[12] See also Id. at p. 219 ("Number one, I never managed vessels for anyone while on Osprey-Acomarit's payroll. I never received a job description or a contract from any of the people that I did consulting work with or for."); Id. at 224 ("Bear in mind, my responsibilities in Acomarit evolved into an outside consultancy-ship with various parties. So when I attended vessels, I never had any responsibilities and authority aboard such vessels.").

He was also clear that Acomarit Maritimes Services "owned no vessels. It was strictly a management company" and managed the vessels that he attended on its behalf. Id. at 88. Moreover, he insisted that although he was physically present on the vessels he attended and assisted in various inspections, as noted he "had no authority or responsibility aboard the vessel" or off the vessel and no one on the vessel reported to him. Id. at 66-67. If he saw something on the vessel that needed to be corrected, he would report it to the Vessel Master. Id. at 69-70.[13] He testified, "You have to bear in mind that through my tenure with Acomarit, I had no authority to interrogate anyone, to make sure that the repairs were completed. Basically, I took people at their word, or usually learned that things were going slower than normal or they required more assistance." Id. at 119. See also Id. at 158 (With respect to the vessels that he attended as Port Captain under his arrangement with Osprey Acomarit, as an employee, "I had no authority, whatsoever, to enter into any contractual obligation on behalf of Osprey-Acomarit or any of the companies.")

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[12] Garrett testified that he visited the M/V Marine Atlantic three or four times. Id. at 128-29. He testified, "Osprey-Acomarit had no role in the management or the operation of the . . . Marine Atlantic." Id. at 131. He recalled performing an ISM audit for Acomarit Maritimes while he was an Osprey-Acomarit employee. Id, at 85. He also described that once in the first quarter of 1997, because Exxon or Vela was considering chartering the tanker, when he and a vetting inspector interested in cranes performed operational control tests of vessel's cranes, which were manufactured by Appleton, and examined the cranes' records and the operational manual, during the vetting inspection. Id- at 127-29, 140-43. They operated the cranes in every mode possible and found no "indication that there was anything wrong with the internal mechanisms of that crane." Id. at 141. He stated, "There was nothing with the cranes aboard the Marine Atlantic that would have led me to believe that there was an inherent flaw in that crane or those cranes." Id.. at 127. Garrett represented that he was working for Osprey-Acomarit during the 1997 oil vetting inspection of the M/V Marine Atlantic, but that he was attending on behalf of Acomarit Services Maritimes. Id. at 64-65.

Garrett also clarified the fact that while he received payments from Osprey-Acomarit, such reimbursement came from the vessel operator for which he acted as a consultant. Id. at 109. He explained,

> During my employment with, I'm going to use the term "Acomarit," I worked for a variety of

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[13] Asked what Garrett would do if the Vessel Master reported a problem to Garrett, Garrett stated clearly that his role would be merely as a consultant, but that the Vessel Master would have to "order[] any necessary parts, material or labor to fix a problem" and report to his superior, the Marine Superintendent. Id. at 7071.

> people; and being that Acomarit had several European offices, clients such as Torm paid my services through Acomarit U.K. Limited to Acomarit Geneva to Osprey Ship Management. So acting as a consultant, my time was apportioned to people outside of Acomarit.

Id. at 157. When there were expenses, such as flying to the area, hotel, car rental, purchase of publications and charts for the benefit of the vessels he was attending, he was reimbursed after he would inform the operator of the vessel, which would in turn notify the local Acomarit office. The operator would reimburse Acomarit, which in turn reimbursed him through Osprey Acomarit, which issued him checks: "Osprey-Acomarit received notification to extend me funds once expenses had been approved." Id. at 159-62. He analogized payments for his services:

> Osprey, the Acomarit group that I worked with, consulting-wise, controlled some of my payments. That's the easiest way to explain it, because, let's say you have a company, okay, you need someone to perform a specific operation, you understand that Captain Saudi over there has an operating company and he has people he could, as you say, loan to you, I would be loaning to you. Now Captain Saudi, with his company, he is located in a different area than I am, and there are very long, specific requirements to fulfill the obligations under IRS and several other things, you pay Captain Saudi, Captain Saudi pays the office that I work for, and I eventually get my money."

Id. at 162. He would be reimbursed electronically in his bank account. Id. at 163. "Osprey-Acomarit would not have given me funds had they not received them first." Id. at 164.

Despite these clear professions, Saudi attempts without success to use Garrett's deposition to argue that osprey is liable as a manager/operator through Garrett's activities.

In sum, the Court finds that the deposition testimony of Tom Garrett does not support Saudi's claims that Garrett's activities as a "co-employee" of Acomarit Services Maritimes and Osprey should impose unseaworthiness liability on Osprey as an operator or manager of the M/V Atlantic. Nor has there been any evidence submitted of misrepresentations or tortious conduct by Garrett in 1997 or other times or that his attending inspections in 1997 proximately caused Saudi's injuries in 1999.

Thus this Court agrees with Osprey that Saudi has not presented competent summary judgment evidence raising a genuine issue of material fact to support Saudi's claims of negligence against osprey and allegations that managed the SIT Marine Atlantic through the activities of Garrett. Mere speculation will not defeat a motion for summary judgment. This case is set for docket call on April 6, 2001. By now Saudi has had substantial time to obtain factual evidence to support his conclusory allegations, but he has failed to submit any to the Court. Therefore the Court

ORDERS that Osprey's motion for summary judgment on the negligence claims under common and maritime law against it is

GRANTED.

SIGNED at Houston, Texas, this 19th day of February, 2001

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff,
V.
S/T MARINE ATLANTIC, ET AL.,
Defendants.

MEMORANDUM AND RECOMMENDATION

Before the Magistrate Judge upon referral from the District Judge is Defendants' Joint Motion to Strike Plaintiff's Experts Salah Mahmoud and Sheriff Saudi (Document No. 220). Plaintiff has filed a response to the motion (Document No. 252), to which Defendants have filed a Reply (Document No. 253). Having considered the parties' submissions, the opinions and deposition testimony of Salah Mahmoud and Sheriff Saudi, and the reliability requirements set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and FED. R. EVID. 702, the Magistrate Judge RECOMMENDS, for the reasons set forth below, that Defendants' Joint Motion to Strike Plaintiff's Experts Salah Mahmoud and Sheriff Saudi (Document No. 220) be GRANTED.

Reliability Requirements

FED. R. Evan. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data; (2) the

> testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the fact of the case.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court held that "scientific" expert testimony must both reliable and relevant to be admissible. In *Kianho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court extended the reliability and relevancy requirements to all expert witness testimony, regardless of whether the expert possesses "scientific, technical, or other specialized knowledge". Although relevancy issues are generally straightforward, reliability issues are not. At its most basic, *Daubert's* reliability requirement forecloses the admission of expert witness testimony when it is not "supported by appropriate validation." *Daubert*, 509 U.S. at 590. In other words, the expert's opinion must be grounded in more than "unsupported speculation or subjective belief." *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999).

When scientific expert witness testimony is challenge for reliability, four nonexclusive factors are generally considered: 1) whether the theory or technique upon which the expert witness' opinion is based has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) whether the theory or technique has a known or potential rate of error; and 4) whether the theory or technique has achieved "general acceptance" in the relevant scientific community. *Daubert*, 509 at 593-595. When technical or other specialized knowledge forms the basis of an expert witness' opinion, the foregoing factors may or may not have any applicability, and the district court will have to determine, on a case by case basis, how to test the reliability of the expert's opinions. *Kumho*, 526 U.S. at 150-151.

Salah Mahmoud

Defendants seek to strike Salah Mahmoud as an expert in this case on the basis that: 1) there is no data or reliable methodology to support his opinion that an ABS survey of the crane in December 1998 could not have occurred or could not have occurred as documented; 2) his opinion as to corrosion rate is unreliable because it is based on the assumption, which has no factual support, that the crane at issue in this case was submerged in seawater; and 3) he. is not qualified as an expert in crane maintenance and inspection, having no training or experience with applicable regulations or industry standards for the maintenance and inspection of cranes. Additionally, Defendants object to Mahmoud's calculation of the amount of corrosion on two spline gears (.21 to .25 inches), because that calculation was nôt made by reference to the original diameters of the gears, and because Mahmoud did not calibrate the equipment he used to measure the spline gears.

Mahmoud's opinion that an ABS survey of the crane could not have been performed in December 1998 (or could not have been performed as documented), and his opinion as to the corrosion rate are opinions that are based insufficient facts and data. In addition, given the insufficient facts and data to support the opinions, the opinions are unreliable.

Mahmoud speculates that the ABS crane survey could not have occurred in December 1998. According to Mahmoud, it is unthinkable that the crane would have failed with a load of 200 pounds in May 1999 if a load test of 50,000 pounds had actually been performed on the crane in December 1998. Plaintiff, in response to Defendants' Joint Motion to Strike, posits that Mahmoud's opinion is supported by "common sense." To the extent Mahmoud's opinion as to whether the ABS crane survey was actually conducted in December 1998 is nothing more than "common sense", expert testimony is not needed. However, in addressing Defendants' complaints about the reliability of such a "common sense" opinion, it is evident that Mahmoud's opinion is pure speculation. Mahmoud was not present at the time the ABS survey was to have occurred, and he has articulated no *facts* to support his speculation that the survey could not have occurred. Moreover, Mahmoud has not explained or supported his speculative opinion as to whether the survey occurred with evidence that nothing else during the six month period between the survey and the crane failure could have led to or contributed to the failure. Because Mahmoud's opinion that the ABS survey of the crane in December 1998 either did not occur or did not occur as documented is not supported by any facts or data and is speculative, that opinion is not admissible under FED. R. EVID. 702.

With respect to Mahmoud's opinion as to the corrosion rate, as has been shown by Defendants, and as is reflected in Mahmoud's deposition, Mahmoud's opinion about the rate of corrosion is based on his unsupported belief that the crane was submerged in saltwater. Neither Plaintiff nor Mahmoud has offered any evidence that the crane was in fact submerged in saltwater and was therefore subject to a corrosion rate based on saltwater submersion. As such, this opinion of Mahmoud is also based on insufficient facts and data, and is therefore inadmissible under FED. R. EVID. 702.

With respect to Mahmoud's opinions as to crane maintenance and inspection requirements, Mahmoud's deposition evidences that he is not qualified to offer opinions on crane maintenance and inspection requirements. Mahmoud has no training or experience in the inspection of cranes, and is generally unaware of the rules, regulations and industry standards governing the maintenance and inspection of cranes. Accordingly, any opinion by Mahmoud as to crane maintenance and inspection requirements is inadmissible under FED. R. EVID. 702.

Finally, with respect to Mahmoud's opinion of the amount of corrosion of two spline gears, which he determined from the difference in the length of existing "teeth" on the gear and worn "teeth", the undersigned concludes that while Mahmoud did not calibrate the equipment he used, and did not know the original diameter of the teeth, his calculations are simplistic and reliably evidence the difference between the length of the worn teeth and the existing (or intact) teeth on the gears. As such, subject to a motion in limine in which this issue may be revisited at trial, Mahmoud's opinion as to the amount of corrosion on two spline gears should not, at this stage, be disallowed.

Sheriff Saudi

Defendants seek to exclude the opinions of Plaintiff Sheriff Saudi as to (1) the inspection of cranes; (2) the load testing of cranes; (3) applicable standards, rules and regulations regarding crane inspections; (4) applicable standards, rules and regulations regarding load testing; (5) applicable standards, rules and regulations regarding quadrennial inspection of cranes; (6) classification society standards for the inspection of cranes, including those of the ABS, Det Norske Veritas ("DNV"), and Lloyd's of London, and (7) duties, responsibilities and the standard of care applicable to the refurbishing of the MARINE ATLANTIC. According to Defendants, Sheriff Saudi has no training or experience relative to the inspection of cranes, and no training, experience or practice knowledge of the rules, regulations and industry standards for the inspection of cranes or the refurbishing of vessels.

The undersigned has reviewed the deposition of Plaintiff Sheriff Saudi provided by Defendants as an exhibit to their Joint Motion to Strike. Saudi's deposition testimony reveals conclusively that he has no training experience or personal knowledge which would qualify him as an expert in crane inspection, load inspections, applicable rules, regulations and industry standards for the inspection of cranes and the refurbishment of vessels. The fact that Saudi is a captain with many years of experience as a master of vessels, a mooring master pilot, and an instruction pilot does not suffice as experience or training which would qualify Saudi to testify as an expert in crane inspection and maintenance. Accordingly, the Magistrate Judge recommends that Plaintiff Sheriff Saudi be disallowed from testifying as an expert on the following topics: (1) the inspection of cranes; (2) the load testing of cranes; (3) applicable standards, rules and regulations regarding crane inspections; (4) applicable standards, rules and regulations regarding load testing; (5) applicable standards, rules and regulations regarding quadrennial inspection of cranes; (6) classification society standards for the inspection of cranes, including those of the ABS, Det Norske Veritas ("DNV"), and Lloyd's of London, and (7) duties, responsibilities and the standard of care applicable to the refurbishing of the MARINE ATLANTIC.

Conclusion

Based on the foregoing and the conclusion from the parties' submissions that certain opinions of Salah Mahmoud and Plaintiff Sheriff Saudi are inadmissible under Fed. R. EVID. 702, the Magistrate Judge

RECOMMENDS that Defendants' Joint Motion to Strike Plaintiff's Experts Salah Mahmoud and Sheriff Saudi (Document No. 220) be GRANTED IN PART; that Salah Mahmoud be disallowed from testifying about (1) whether the ABS crane survey in December 1998 was performed or performed as documented; (2) the corrosion rate; and (3) crane maintenance and inspection requirements; and that Plaintiff Sheriff Saudi be disallowed from offering any expert opinion testimony on (1) the inspection of cranes; (2) the load testing of cranes; (3) applicable standards, rules and regulations regarding crane inspections; (4) applicable standards, rules and regulations regarding load testing; (5) applicable standards, rules and regulations regarding quadrennial inspection of cranes; (6) classification society standards for the inspection of cranes, including those of the ABS, Det Norske Veritas ("DNV"), and Lloyd's of London, and (7) duties, responsibilities and the standard of care applicable to the refurbishing of the MARINE ATLANTIC.

The Clerk shall file this instrument and provide a copy to all counsel and unrepresented parties of record. Within 10 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C. § 636(b)(1)(C), FED. R.. Civ..P. 72(b), and General Order 805, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual findings on appeal. Thomas v. Avn, 474 U.S. 140 (1985); Ware v. King, 694 F.2d 89 (5th Cir. 1982), cent. denied, 461 U.S. 930 (1983); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en bane). Moreover, absent plain error, failure to file objections within the ten day period bars an aggrieved party from attacking conclusions of law on appeal. Thomas v. Am, 474 U.S. 140 (1985); Ware v. King, 694 F.2d 89 (5th Cir. 1982), cert. denied, 461 U.S. 930 (1983); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc). Moreover, absent plain error, failure to file objections within the ten day period bars an aggrieved party from attacking conclusions of law on appeal. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5th Cir. 1996). The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208.

Signed at Houston, Texas, this 26th day of January, 2001.

FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

Appendix I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff,
V.
S/T MARINE ATLANTIC, ET AL.,
Defendants.

ORDER

Defendants' Joint Motion to Strike Plaintiff's Experts Salah Mahmoud and Sheriff Saudi (Document No. 220) has been referred to the undersigned. A written response to that motion, pursuant to the Local Rules of this District, is due on or before January 4, 2001. In a letter to the Court dated December 21, 2000, Plaintiff's counsel asked that the Joint Motion to Strike be stricken because it did not contain a certificate of conference. Additionally, in that letter, Plaintiff's counsel asked to be afforded the twenty day response time provided for by the Local Rules prior to a hearing being held on the motion. The twenty day response time provided for by the Local Rules applies to the Joint Motion to Strike, and for purposes of clarity as well as to obviate the need to address any requested extensions of that response deadline, undersigned advises Plaintiff that his response to the Joint Motion to Strike must be filed on or before January 8, 2001, or such response will not be considered.

Signed at Houston, Texas, this 3rd day of January 2001.

FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

Appendix J

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.
S/T [MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, S ACOMARIT SERVICES MARITIMES, S .A. , OSPREY ACOMARIT SHIP ENTERED MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINE CO. (Appleton Marine Division), APPLETON MACHINE CO . , INC . , Michael N. Milby, Clerk APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall. of Plaintiff Captain Sheriff Saudi ("Plaintiff' or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, is inter alia Defendant Marine Atlantic Ltd.'s opposed motion to dismiss for lack of personal jurisdiction (#162).

With a supporting affidavit (#164) from its Director and Vice President Arthur Jones, Defendant Marine Atlantic Ltd. argues that this Court lacks personal jurisdiction over it.[1] First, its

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[1] Federal Rule of Civil Procedure 4(e) permits a district court to assert personal jurisdiction over a nonresident in a diversity action to the extent allowed under the law of the state where the district court sits. A Texas court has personal jurisdiction under the Texas long-arm statute over a foreign defendant that "does business" in Texas. i.e., that (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in Texas; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside of Texas. Tex. Civ. Prac. & Rem. Code 17.042.045 (West 1999). The Texas Supreme Court has interpreted the language of its long-arm statute to reach as far as the federal constitutional requirements of due process will allow. Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990). Thus the Court examines the due process requirements.

A party's liberty interest under the fourteenth amendment protects it from being subjected to binding judgments of a forum with which it has established no meaningful contacts, ties or relations." Guidry v. U.S. Tobacco Co., Inc., 188 F.3d 619, 623 (5th Cir. 1999), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), and International Shoe v. Washinqton, 326 U.S. 310, 319 (1945). The due process clause requires that a foreign defendant have "minimum contacts" with the forum state so that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice." Id., citing International Shoe, 326 U.S. at 316. For minimum contacts, a nonresident defendant must have purposefully availed himself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. Gardemal v. Westin Hotel Co., 186 F.3d 588, 595 (5th Cir. 1999).

Where a nonresident defendant has sufficient "continuous and systematic" contacts with the state in which the suit is pending, the court may exercise "general" personal jurisdiction over that party in a cause of action that does not arise out of or relate to that defendant's contacts with the forum state. Guidry, 1.88 F.3d at 623, citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). "Continuous and systematic contacts" are required by the due process clause because the forum state does not have a direct interest in the cause of action. Gardemal, 186 F.3d at 595. Thus the minimum contacts review is more demanding and broader for general jurisdiction and requires the plaintiff to demonstrate substantial activities in the forum state. Id.

Where the controversy "is related to or arises out of [the defendant's] contacts with the forum," the district court may exercise "specific" personal jurisdiction. Guidry, 166 F.3d at

623, citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977). The court must examine the relationship among the defendant, the forum state, and the litigation to determine whether the defendant purposefully established "minimum contacts" with the forum state that made it foreseeable that it should "reasonably anticipate being haled into court there." Id. at 625, citing Burger King, 471 U.S at 474. To decide if there is specific jurisdiction, the district court must apply a three-prong test: (1) whether the defendant has minimum contacts with the forum state, i.e., did it purposely direct its activities toward the forum state or purposely avail itself of the privilege of conducting activities there; (2) did the plaintiff's cause of action arise out of or result from the defendant's forum-related contacts; and (3) would the exercise of personal jurisdiction be fair and reasonable? Id.

If the court finds that the foreign defendant's related or unrelated contacts with the forum state are sufficient, it then examines whether the exercise of jurisdiction is "fair" by examining several factors relating to 'traditional notions of fair play and substantial justice": (1) the burden on the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental social policies. Felch v. Transportes Lar-Mex SA de CV, 92 F.3d 320, 324 (5th Cir. 1996).

The party that invokes a federal court's jurisdiction bears the burden of establishing minimum contacts that warrant the exercise of personal jurisdiction over a foreign defendant. Id., citing Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990). If the court rules on a motion to dismiss for lack of jurisdiction without holding an evidentiary hearing, the nonmoving party need only make a prima facie showing, through pleadings, depositions, affidavits, exhibits, or any combination of recognized methods of discovery, of minimum contacts of each defendant to support specific personal jurisdiction and demonstrate that the cause of action arose out of that defendant's forumrelated contacts; the court must accept as true the nonmovant's allegations and resolve all factual disputes in its favor. Id., citing Latshaw v. Johnston, 167 F.3d 208, 211 (5th Cir. 1999), and Bullion, 895 F.2d at 217 ("uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor"); Colwell Realty Investments v. Triple T Inns of Arizona, 785 F.2d 1330, 1333 (5th Cir. 1986). Ultimately, the plaintiff must establish personal jurisdiction by a preponderance of the evidence either at a pretrial evidentiary 'hearing or at trial. Felch, 92 F.3d at 326, citing Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826, 831 (5th Cir. 1986), modified on rehearing in unrelated part, 836 F.2d 850 (5th Cir. 1988), and DeMelo v. Toche marine, Inc., 711 F.2d 1260, 1270-71 & n. 12 (5th Cir. 1986) (only where the district court decides a motion to dismiss for lack of personal jurisdiction without a vessel, the Marine Atlantic, at approximately 400,000 deadweight tons and with a deep draft of seventy-five feet when fully loaded, is unable to enter into any port in the continental United States, including any port in Texas. It is physically impossible for the vessel to navigate within the territorial waters of Texas, which extend approximately ten miles seaward from the state of Texas. At the time of Saudi's injury, the vessel was operated by Acomarit Services pursuant to a Vessel Management Agreement between Marine Atlantic Ltd. and Acomarit and was chartered by Koch Shipping, Inc., which directly ordered the vessel to ports for loading and discharging of the cargo, pursuant to a Time Charter Agreement between Marine Atlantic Ltd. and Koch. As owner, Marine Atlantic Ltd. did not exercise day-to-day operational control of the vessel or control her location. The contract between Marine Atlantic Ltd. and Acomarit was not negotiated in Texas, nor is either a Texas entity. The contract between Marine Atlantic Ltd. and Koch also was not negotiated in Texas and neither is a Texas entity. Acomarit's contract performance took place in Geneva, Switzerland, while Koch's contract performance occurred in Kansas.

Marine Atlantic Ltd. argues that this Court lacks specific jurisdiction over it because this action does not arise out of or relate to any contact between it and Texas or any activities in Texas, but only to activities on the high seas, in international waters. Marine Atlantic Ltd. maintains that it has

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hearing may the plaintiffs satisfy their burden by presenting a prima facie case). A dismissal for lack of personal jurisdiction is not a dismissal on the merits and must therefore be without prejudice. Guidry, 188 F. 3d at 623.

no contacts with Texas. It cites as on-point authority for its dismissal, Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 786 (5th Cir. 1999), in which the defendant was dismissed because it had no contacts with the forum, lacked control over where the vessel would make port, and never called and was physically unable to call on a Texas port.

Marine Atlantic Ltd. also insists the Court lacks general jurisdiction over it because it is not authorized to do business in Texas, never had an agent for service of process in Texas, never had an employee based in Texas, never owned any real property in Texas, never maintained an office in Texas, does not maintain any records in Texas, never solicited business in Texas and never signed a contract in Texas for performance of work in Texas. It has no contacts with Texas and lacked authority to direct the vessel's movement.

In response, asserting that the S/T Marine Atlantic's deep draft and inability to enter the territorial waters of Texas are not fatal to the assertion of jurisdiction here, Saudi complains that Marine Atlantic Ltd. avoids any discussion of its contacts with states other than Texas and with the United States in generally. He argues that the commentary to Federal Rule of Civil Procedure 4 (k) (2) indicates that the rule was intended by Congress to extend nationwide federal personal jurisdiction over defendants with sufficient contacts with the United States as a whole where the exercise of such personal jurisdiction would not "offend the traditional concepts of fair play and substantial justice". CBE-cause Marine Atlantic Ltd. failed to address its contacts with the United States as a whole, Saudi insists that Marine Atlantic Ltd.'s motion is defective and cannot support the requested dismissal. He comments that the now complete[2] affidavit of Arthur Jones also "studiously avoids making any denial that [Marine Atlantic] has no contacts with the United States."

Moreover, Saudi emphasizes, Marine Atlantic Ltd. has admitted having done business with Koch Shipping, Inc., a United States company. With other factors, such as hiring United States residents to conduct business for its benefit, this point may be sufficient to sustain personal jurisdiction, insists Saudi. Marine Atlantic Ltd. has conceded that Koch Shipping, Inc.'s portion of the charter contract was performed in Kansas.

Saudi alleges that Robert Hamshaw and Greg Doyle are agents of Marine Atlantic Ltd. Saudi submits a letter dated May 3, 2000, written by Thomas Nork, whom Saudi characterized as apparent counsel for Marine Atlantic Ltd. at that time,[3] stating that Robert Hamshaw would not appear for his noticed deposition and that "Hamshaw's relationship with Marine Atlantic Ltd., if any," was unclear. Ex. A to #173. Nevertheless, Saudi argues, Hamshaw's name was listed as the agent designated to receive notice for ship owners in the Acomarit Ship Management Agreement with Marine Atlantic Ltd. Ex. B to 4173. In an affidavit filed on March 22,

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[2] Saudi states that the affidavit, which he previously had received as exhibit A to Marine Atlantic Ltd.'s earlier motion to dismiss for lack of jurisdiction, lacked a second page.

[3] Saudi fails to mention, but the letter makes clear, that at the time Marine Atlantic, Ltd. was not party to this suit and had not been served. Nork expressly informed Mr. Izen, "This office will not accept service of suit papers on behalf of Marine Atlantic Ltd. at this time."

2000, Hamshaw identified himself as an "assistant secretary for Marine Atlantic Ltd.," but claimed he was not a registered agent for service of process on Marine Atlantic Ltd., nor its president, treasurer, clerk or cashier, but was employed as Executive Vice President of Alpha Export Services, Inc. in New York City. He also stated that Marine Atlantic Ltd. did not maintain a business office in New York City. Ex. C.

Similarly, Greg Doyle, in a previously filed affidavit, identified himself as "self-employed, " and as "a chartering manager for the vessel S/T Marine Atlantic." He admitted working in the United States, but maintained that he was not an employee of Marine Atlantic Ltd. and that it did not have a business address in Massachusetts.[4]

Saudi asked for additional discovery to determine the precise relationship of Hamshaw and Doyle to Marine Atlantic Ltd. and the full extent of business and activities they carried out on its behalf in the United States. New York Marine Managers, Inc. v. N.V. Topor-1, 716 F. Supp. 783, 785 (S.D.N.Y. 1989) (foreign company's listing of a United States company's office address as its own constituted strong evidence that the foreign company was using the United States company as its New York agent and the court had personal jurisdiction; a foreign company cannot carry out business in the United States through surrogates and thereby avoid the reach of personal jurisdiction).

Saudi charges that this evidence, viewed in a light favorable to him, "establishes that Marine Atlantic Ltd. has attempted to order its affairs in such a manner as to carry out business through executives or agents who are hired by other companies and perform acts which Marine Atlantic Ltd. would have to perform for itself if these U.S. agents or employees were not available to do so." He claims that, like Tom Garrett, the ostensible employee of Acomarit Services, Maritimes, S.A., Doyle and Hamshaw purport to be employees of United States companies but are carrying out activities for foreign companies in the United States. In a footnote Saudi observes, "This carrying out of business through clandestine surrogates in order to avoid the jurisdiction of the U.S. Courts is a common theme in this case." Instrument # 174 at 6 n.4.

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[4] Nork's letter to Izen states the Nork's firm, understands that Doyle "is not an employee of Marine Atlantic Ltd." and thus also would not likely appear for his noticed deposition.

In reply, Marine Atlantic Ltd. emphasizes that this Court, in an order of August 31, 2000, entered on September 5, 2000 (# 159), set aside the entry of default against Marine Atlantic Ltd. Marine Atlantic Ltd. contends that that order bars Plaintiff from asserting that Rule 4(k)(2)[5] jurisdiction exists over Marine Atlantic Ltd. because Rule 4(k) (2) jurisdiction is premised upon effective service of summons or a valid waiver of service. Marine Atlantic Ltd. never waived service of process, and the Court's order found that Marine Atlantic ltd. was not properly served with process. Therefore the predicate requirement for application of 4(k)(2) jurisdiction does not exist and Plaintiff is barred by res judicata or collateral estoppel from asserting that proper service occurred in this case.[6] Furthermore, Plaintiff failed to serve Marine Atlantic Ltd. within 120 days of the date of filing of the original complaint, as required by Fed. R. Civ. P. 4(m) and failed to request timely an extension of that time period. Saudi has not shown grounds for excusable neglect to support an extension of the service period. Moreover, Marine Atlantic Ltd. has never waived its affirmative defenses of insufficiency of process and insufficiency of service of process. Thus there is no basis to assert personal jurisdiction under Rule 4(k)(2) over marine Atlantic Ltd.

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[5] Fed. R. Civ. P. 4 (k) (2) reads,

> If the exercise of jurisdiction is consistent with the Constitution and laws of the Untied States, serving summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts or general jurisdiction of any state.

Moreover, urges Marine Atlantic Ltd., there is also no basis for conducting additional jurisdictional discovery. Plaintiff has had more than fifteen months to conduct such discovery and has done nothing. In sum, the Court should dismiss Marine Atlantic Ltd. from this case for lack of personal jurisdiction.

This Court has indicated several times to Plaintiff's counsel that the party that invokes a federal court's jurisdiction bears the burden of establishing minimum contacts that warrant the exercise of personal jurisdiction over a foreign defendant. Felch

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[6] The Court agrees that by its express terms Rule 4(k)(2), providing for nationwide contacts where there is no personal jurisdiction over a foreign defendant in any state, require "serving a summons or filing a waiver of service" to establish jurisdiction.

v. Transportes Lar-Mex SA de CV, 92 F.3d 320, 324 (5th Cir. 1996), citing Bullion v. Gillespie, 895 F.2d 213, 216 (5th Cir. 1990). Therefore Saudi's efforts to place that burden on Marine Atlantic Ltd. by arguing that it has avoided discussing its contacts with the United States as a whole are misguided.

This Court agrees that Plaintiff has failed to show that valid service of process was ever effected on Marine Atlantic Ltd., which voluntarily appeared only after a default judgment was entered against it and filed its answer (#95) asserting lack of personal jurisdiction as its first defense. Moreover, Plaintiff has had substantial time to find sufficient minimum contacts of Marine Atlantic Ltd. with Texas or, if Rule 4 (k) (2) did apply, with the United States to justify this Court's assertion of personal jurisdiction over Marine Atlantic Ltd. Nevertheless he has failed to allege, no less support with evidence, the existence of such contacts, but instead has indulged in mere suspicion and speculation. Moreover, most of the arguments raised in this motion and its response and reply are the same as those ruled on by the Court in its detailed opinion entered on September 5, 2000 (#159), and they are still without supporting evidence or even specific factual allegations. Furthermore on November 21, 2000 Judge Stacy granted Plaintiff leave to depose Hamshaw and, if he could subpoena Doyle, Doyle. Instrument #202. Even after Hamshaw's deposition, the transcript of that deposition attached to Saudi's motion to resume that deposition (which was denied by Magistrate Judge Stacy on December 20, 2000, #231) fails to reveal any contacts nationwide or in Texas that would support personal jurisdiction over Marine out of Atlantic Ltd. Saudi still[7] has not shown any basis for concluding that Doyle and Hamshaw were authorized agents for service nor that their activities, if any, on behalf of Marine Atlantic Ltd. in the United States were sufficient to impose personal jurisdiction on Marine Atlantic Ltd.

Thus because of the extensive time already allowed to Plaintiff and his failure to discover and prove any contacts Marine Atlantic Ltd. with Texas or the United States, and given the long-past discovery deadline of December 1, 2000, the Court

ORDERS that Marine Atlantic Ltd.'s motion to dismiss for lack of personal jurisdiction is GRANTED without prejudice.

SIGNED at Houston, Texas, this 21st day of December, 2000.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

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[7] Docket call is set in this action on February 9, 2000, with trial to follow during the next two weeks.

Appendix K

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS
.S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her ENTERED Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, Michael N. Milby, Clerk ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINES CO. (Appleton Marine Division), APPLETON MACHINE COY., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, are inter alia Plaintiff's motion for leave to file fourth amended complaint (#188) and motion for leave to file fifth amended complaint (#205), and Defendants Marine Atlantic Ltd. and Osprey Ship Management, Inc.'s ("Osprey's") related motion to strike Plaintiff's jury demand (part of #192).

Plaintiff's motion for leave to file fifth amended complaint (#205), which would appear to supersede the motion to file the fourth, asserts that Plaintiff seeks amendment to delete Defendants that were dismissed from this action previously by the Court and to conform the allegations supporting his causes of action to facts and evidence gathered during discovery.

Defendants Marine Atlantic Limited and Osprey Ship Management Inc. ("Osprey") object that the proposed fifth amended complaint for the first time in this litigation, and only after Defendants have filed a motion to strike Plaintiff's jury demand, alleges there is diversity jurisdiction in this action. Defendants have steadily objected to the jury demand because Saudi has always asserted admiralty and maritime jurisdiction, which does not entitle him to a jury. Harrison v. Flota Mercante Grancolombiana. S.A., 577 F.2d 968, 986 (5th Cir. 1978), rejecting Saudi's authority for amendment and jury demand, Oroco Marine, Inc. v. National Marine Service, Inc., 71 F.R.D. 220 (S.D. Tex. 1976). Defendants also emphasize that the deadline for amending pleadings was November 1, 2000. Moreover, they complain that the application of diversity jurisdiction would change the substantive law from federal maritime law to state law; they maintain there is no basis for the application of state law here because the tort claims involve conduct aboard a foreign flag vessel on the high seas and the alleged refurbishment of the tanker Marine Atlantic occurred pursuant to a maritime shipyard contract that is subject to the Court's admiralty jurisdiction. The Jack-O-Lantern New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96, 99-100 (1922) (a contract for repair or reconstruction of a ship is a maritime contract subject to the court's admiralty jurisdiction); La Esperanza de P.R., Inc. v. Perez Y Cia. De Puerto Rico, Inc., 124 F.3d 10, 16 (1st Cir. 1997) ("contracts for repairs to a vessel or for its substantial. reconstruction come under the scope of admiralty jurisdiction"), citing Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961) (contrasting ship repair and new ship construction). Thus claim Defendants, they would be substantially prejudiced by the fifth amended complaint.

Marine Atlantic Ltd. and osprey have also moved to strike Plaintiff's jury demand (part of #192). These Defendants argue that Saudi is not entitled to a jury trial because his remaining negligence claims are based on general maritime law since they are claims for alleged maritime tort committed on the high seas. Dean v. Chesapeake Bay Ferry Dist., 158 F. Supp. 408, 410 (E.D. Va. 1958)("Authorities are legion to the effect that every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance, providing that the substance and consummation of the wrong and injury take place upon these waters."). General maritime law does not afford a right to a jury trial. In re Consolidation Coal, 123 F.3d 126, 132, 134 (3d Cir. 1997)("There is no right to a jury in actions instituted in admiralty . . . ."), cert. denied sub nom. Newman v. Consolidation Coal Co., 523 U.S. 1054 (1998); Concordia Co., Inc. v. Panek, 115 F.3d 67, 70 (1st Cir. 1997) ("Generally, there is no constitutional right to a jury trial for admiralty claims), citing Fitzqerald v. United States Lines Co., 374 U.S. 16, 19 (1963). See also Durden v. Exxon Corp., 803 F.2d 845, 848-50 (5th Cir. 1986) (where Jones Act claim was properly dismissed leaving only claims for unseaworthiness and negligence, plaintiff was not entitled to a jury trial); T.N.T. Marine Serv. Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 587 (5th Cir. 1983) (Fed. R. Civ. P. 9 (h) "makes clear that Rule 38 (e) denies a right to trial by jury on any claim that is cognizable only in admiralty, regardless of what the pleading says."), cert. denied, 467 U.S. 847 (1983).

Saudi responds that he is entitled to a jury trial because there is diversity jurisdiction here over his claim for negligence under common law, product liability, and breach of warranty arising out of the negligent refurbishment of the vessel at the Keppel Shipyards in Singapore. His jury demand has been on file since the beginning of this suit. Conti v. Sanko S.S. Co., Ltd., 912 F.2d 816 (5th Cir. 1990) (hodling that district court's refusal to allow longshoreman to amend his pleadings so that the sole basis for jurisdiction was diversity was an abuse of discretion). Thus Defendants' objections to his motions for leave to amend on the grounds that he is simply attempting to delete any reference to admiralty jurisdiction are unfounded. A plaintiff with a state common-law cause of action that also falls under admiralty jurisdiction may elect to bring suit either as an admiralty action in federal court or as a state common-law action in state court or federal court as long is it meets jurisdictional requirements. 28 U.S.C. S 1331(1); T.N.T. Service v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585. Contrary to Defendants' argument, not all tortious acts complained of here were committed on the high seas; Saudi has also alleged that MTL and MTC reactivated the vessel in dry dock in Singapore. He therefore has a right to a jury trial on these claims, based on diversity jurisdiction. Moreover, because these claims arise out of the same facts as those supporting his tort claims against Marine Atlantic Ltd. and osprey for acts committed on the high seas, Saudi insists he is entitled to a jury trial on all his claims. Oroco Marine, Inc. v. Nat. Marine Service, Inc., 71 F.R.D. 220 (S-D. Tex. 1976) (holding that the absence of admiralty designation under the rule in the third-party complaint plus the presence of diversity jurisdiction over the third-party claim mandated that the third party's jury request be granted).[1]

In reply, Marine Atlantic Ltd. and Osprey observe that although Saudi filed this action in August 1999, not until Defendants filed a motion to strike Saudi's jury demand did he assert, on November 24, 2000, the existence of diversity jurisdiction, well after the deadline for amending pleadings, i.e., November 1, 2000. He has no excuse for such an untimely assertion of jurisdiction. Furthermore Defendants have never consented to Plaintiff's jury demand and their respective answers to Saudi's pleadings have continuously objected to Saudi's claim that he is entitled to a jury. Saudi has always asserted that his case is founded in admiralty and maritime jurisdiction, under which he does not have a right to a jury trial. They claim they are prejudiced by the untimely assertion of diversity jurisdiction in his proposed fifth amended complaint. Moreover, the application of diversity jurisdiction changes the applicable substantive law, from federal maritime law to state law. They argue that state law does not apply because the alleged tortious conduct involving them occurred aboard a foreign flag vessel on the high seas, thereby implicating federal maritime jurisdiction. The refurbishment of the vessel in a Singapore dry dock was pursuant to a shipyard contract, which is a maritime contract also subject to the Court's admiralty jurisdiction. New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96, 99100 (1922) (contract for repair or reconstruction of ship is a maritime contract subject to the Court's admiralty jurisdiction); La Esperanza de R.R., Inc. v. Perez Y Cia. De Puerto Rico, Inc., 124 F.3d 10, 16 (1st Cir. 1997) ("contracts for repairs to a vessel or for its substantial reconstruction come under the scope of admiralty jurisdiction"), citing Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961) . Finally, Defendants point out that the Fifth Circuit has expressly rejected Oroco Marine Inc. v. National Marine Service, Inc., cited by Saudi to support his jury demand. Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 987 (5th Cir. 1978).

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[1] The Court notes that the Fifth Circuit rejected Oroco's holding in Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 987 (5th Cir. 1978)

Currently the controlling pleading is Plaintiff's third amended complaint (#73), which alleges six causes of action: (1) negligence and gross under common law against all Defendants; (2) unseaworthy vessel and equipment under maritime law against all Defendants; (3) negligence under the Jones Act against all Defendants; (4) breach of warranty of merchantability under pendant jurisdiction against Defendants Valmet-Appleton, Inc., Appleton Machine Co., Inc., Appleton Marine, Inc. and John Doe Company (designer of the crane), now moot because all these Defendants have been dismissed from this action; (5) strict liability in tort for defective design or manufacture and failure to warn against the alleged designers and/or manufacturers of the crane, Defendants Valmet-Appleton, Inc., Appleton Machine Company, Appleton Marine Company, and John Doe Company, now moot for the same reason as the fourth cause of action; and (6) an action in rem against the tanker Marine Atlantic under maritime law. A review of the record reflects that the style of the third amended complaint contains the following notations: "JURY TRIAL DEMANDED"; and "(Common law claims and Jones Act 46 U.S.C. 688)." Under the section entitled "JURISDICTION AND VENUE," the pleading expressly identifies as its subject matter jurisdiction that "this is an Admiralty and Maritime case" with jurisdiction statutorily established under 28 U.S.C. 1331 and 1333, or, alternatively "under Rule 9(h) of the Federal Rules of Civil Procedure, and under 46 U.S.C. 740 and 46 U.S.C. 688."

The proposed fifth amended complaint's style includes the following:

> JURY TRIAL DEMANDED
>
> DIVERSITY JURISDICTION 28 U.S.C. 1332(a)
>
> ADMIRALTY JURISDICTION FOR TORTS COMMITTED ON "HIGH SEAS" 28 U.S.C. 1333

In the body of the complaint under "JURISDICTION AND VENUE," Plaintiff asserts diversity jurisdiction under 28 U.S.C. 1332 (a) over tort claims not committed on the high seas and admiralty jurisdiction under 28 U.S.C. § 1333 for those that were. Furthermore the proposed fifth amended complaint alleges as its causes of action negligence and gross negligence against Defendants remaining in this action; breach of warranty of merchantability against former Defendants Appleton Machine Company [and designer John Doe Company] and Valmet-Appleton, and current Defendants Marine Transport Lines, Inc. and Marine Transport Corporation; strict liability against Marine Transport Lines, Inc. and Marine Transport Corporation; and res ipsa loquitur. He has deleted his in rem claim against the vessel.

Federal statute and Fifth Circuit case law are clear about the issue of entitlement to a jury where either admiralty jurisdiction or both admiralty and diversity jurisdiction are pled. where a plaintiff has a state common law cause of action that may also fall under admiralty jurisdiction, he has an election: he may choose to bring his suit as an admiralty action in federal court; or he can elect to bring it as a state common law action in state court or in federal court if he satisfies the diversity jurisdiction requirements for federal court. 28 U.S.C. 1333(1); T.N.T. Marine Service. Inc. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585, 587 (5th Cir. 1983), cert. denied, 464 U.S. 847 (1983) . Here Plaintiff in his first three complaints did not expressly assert diversity jurisdiction, but claims in the proposed fifth amended complaint that diversity of citizenship exists and thus he is entitled to a jury based on that diversity jurisdiction. In T.N.T., the plaintiff asserted both diversity and admiralty jurisdiction existed. The Fifth Circuit indicated in T.N.T., id., that Rule 9(h) directly states in pertinent part,

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule 14(c), 38(e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

The Fifth Circuit comments,

> The Rule makes two points relevant here. The first sentence indicates that a suit falling under admiralty as well as diversity jurisdiction will be treated as an admiralty case for purposes of the right to a jury trial (Rule 38(e)) if the pleading contains an "identifying statement" asserting an admiralty or maritime claim. The plaintiff may elect to have a suit treated as either a diversity or admiralty suit, each option having advantages and disadvantages, but the plaintiff's case will be treated as one in admiralty "by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim." Fed. R. Civ. P. 9 advisory committed note (1966 amendment). Therefore there is no right to a jury trial where the complaint contains a statement identifying the claim as am admiralty or maritime claim, even though diversity jurisdiction exists as well. Romero v. Bethlehem Steel Corp., 515 F.2d 1249 (5th Cir. 1975).

T.N.T., 702 F.2d at 587. The Fifth Circuit concluded in T.N.T. that although the complaint alleged both diversity and maritime jurisdiction, the plaintiff elected to bring his suit in admiralty. Id. Furthermore, the appellate court pointed to the in rem action against the tug Ocean Wind, her engines, tackle, apparel, etc., as falling within exclusive admiralty jurisdiction, with no right to trial by jury, as an additional basis for admiralty jurisdiction. Id at 588. It concluded, "In short, the plaintiff elected to bring the suit under admiralty jurisdiction and cannot now complaint about his right to a jury." Id. See also Teal v. Eagle Fleet, Inc., 933 F.2d 341, 344 (5th Cir. 1991)("this court has held that a case cognizable under both admiralty and diversity jurisdiction will be treated as an admiralty action even where the complaint does not specifically invoke Rule 9(h) if the plaintiff asserts 'a simple statement asserting admiralty or maritime claims.'" [citing T.N.T. and 5 Wright & Miller, Federal Practice and Procedure: Civil 2d 1313 at 719 (1990))); Conti v. Sanko S. S. Co., Ltd., 912 F.2d 816, 817 (5th Cir. 1990). For similar reasons the Court concludes that both Saudi's third amended complaint and proposed fifth amended complaint reflect an election of admiralty jurisdiction without the right to a jury trial.

Moreover, Marine Atlantic Ltd. and Osprey have shown that even the claims arising out of the refurbishing of the vessel in Singapore pursuant to contract arise, as a matter of law, under general maritime law and therefore Saudi is not entitled to a jury trial on them.

In light of the admiralty and maritime jurisdiction asserted in the first four complaints and recognized by the Court here, the Court grants Marine Atlantic and Osprey's motion to strike Plaintiff's jury demand (part of #192). In re Consolidation coal, 123 F.3d 126, 132, 134 (3d Cir. 1997) ("There is no right to a jury in actions instituted in admiralty . . . ."), cent. denied sub nom. Newman v. Consolidation Coal Co., 523 U.S. 1054 (1998); Concordia Co., Inc. v. Panek, 115 F.3d 67, 70 (1st Cir. 1997) ("Generally, there is no constitutional right to jury trial for admiralty claims."), citing Fitzgerald v. United States Lines, Co., 374 U.S. 16, 19 (1963); Rachal v. Ingram Corp., 795 F.2d 1210, 1213, 1216 (5th Cir. 1986) (admiralty jurisdiction does not give right to jury trial and once a plaintiff elects to plead his case in admiralty, he loses the right to a jury trial).

Moreover, the Court observes that trial in this is set case in February 2001. Allowing such an untimely amendment even if it could convert the non-jury trial to one by a jury, would be substantially prejudicial to Defendants. For all these reasons, the Court denies the motion for leave to file fifth amended complaint.

Plaintiff moves for leave to file a proposed fourth amended complaint, which is similar to prior complaints and asserts causes of action for negligence under the common law and negligence under maritime law against all Defendants, breach of warranty of merchantability under pendent jurisdiction against former Appleton Defendants and remaining Defendants Marine Transport Lines and Marine Transport Corporation, strict liability in tort against Marine Transport Lines and Marine Transport Corporation, an action in rem against the vessel Marine Atlantic, and res ipsa loquitur. No objections have been made to this motion, so the Court grants it. The rulings with respect to the same causes of action in the third amended complaint sounding in admiralty apply to the same in the fourth amended complaint.

ORDERS that Defendants' motion for leave to file fifth amended complaint (#205) is DENIED. Any changes necessary because of dismissed parties and claims can be rectified in the joint

pretrial order, which supersedes the complaint. Because no objections have been filed to Plaintiff's motion for leave to file fourth amended complaint (#188), the Court
ORDERS that it is GRANTED. Finally the Court
ORDERS that Marine Atlantic Ltd. and Osprey's motion to strike Plaintiff's jury demand (part of #192) is GRANTED.
SIGNED at Houston, Texas, this 19th day of December, 2000.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix L

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINE CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, is inter alia Defendants Marine Transport Corporation ("MTC") and Marine Transport Lines, Inc.'s ("MTL's") renewed motion for summary judgment (#158).

The controlling pleading, Plaintiff's third amended complaint (#73), alleges six causes of action: (1) negligence and gross under common law against all Defendants; (2) unseaworthy vessel and equipment under maritime law against all Defendants; (3) negligence under the Jones Act against all Defendants; (4) breach of warranty of merchantability under pendant jurisdiction against Defendants Valmet-Appleton, Inc., Appleton Machine Co., Inc., Appleton Marine, Inc. and John Doe Company (designer of the crane), now moot because all these Defendants have been dismissed from this action; (5) strict liability in tort for defective design or manufacture and failure to warn against the alleged designers and/or manufacturers of the crane, Defendants Valmet-Appleton, Inc., Appleton Machine Company, Appleton Marine Company, and John Doe Company, now moot for the same reason as the fourth cause of action; and (6) an action in rem against the tanker Marine Atlantic under maritime law.

The movant seeking a federal summary judgment initially must inform the court of the basis for his motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that he is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodqe No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim, on which he bears the burden of proof at trial. Fed. R. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion summary judgment. Id. at 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co Ltd. v. Zenith Radio Corp., 475 U.S. 574. SB7-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962) . Once the burden of proof has shifted to the non-movant, he "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.,, 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert.. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825 (1992) . The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. Salis v. Carpenter, 908 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

MTC and MTL, which is a subsidiary of MTC, previously filed a motion for summary judgment, which the Court denied (#91) without prejudice to its being reurged in order to allow the parties limited discovery regarding any involvement in and legal liability that MTC and MTL might have for Plaintiff's injuries. The Court also permitted Plaintiff to file a third amended complaint after this limited discovery. The deadline for discovery has since been extended several times by agreement, and MTC and MTL have produced documents and arranged depositions of Richard Farman, the technical director of MTL, and Peter Popov, the general counsel of the MTC group. Defendants additionally incorporate evidence attached to their earlier motion for summary judgment (#184), including Popov's affidavit signed on April 7, 2000 and attachments thereto.

The third amended complaint identifies MTC and MTL as owners and managers of the tanker Marine Atlantic. MTC and MTL insist that they never owned, operated, managed or chartered the vessel and that they never employed Plaintiff. Therefore, they argue, they owed no legal duty to Plaintiff on the date of his accident or at any other time. They insist that Plaintiff's causes of action properly lie against persons who owned, managed, and operated the tanker on the date of Saudi's injury or against the entity responsible for the design and manufacture of the crane. MTC and MTL insist that discovery has failed to reveal any competent evidence that would dispute Popov's initial affidavit, but only produced material that confirms its accuracy. Moreover, in response to incorrect information published in the 1998 editions of the Lloyd's Register of Shipping and the Guide for the Selection of Tankers, well before Plaintiff's injury, Popov as general counsel for MTC sent a letter dated August 13, 1998 to the publishers of Lloyd's register. That letter summarizes the ownership relationship of MTL and its subsidiaries to the Marine

Atlantic and confirms that their ownership interest in the vessel ended three years before Saudi's accident. Ex. 1; Dep. of Popov at 1, 87-88, Ex. 2.

Thus because MTL and MTC owe no legal duty to Plaintiff, MTC and MTL assert they are entitled to summary judgment on all of Plaintiff's claims.

In response, Saudi states that the third amended complaint describes MTC and MTL not only as owners/managers of the vessel, but charges that they chartered, controlled, operated, maintained, inspected, and tested the vessel. He argues that the testimony of their chief engineer, Richard Farman, established that a Marine Transport subsidiary, Marine Transport International, managed the vessel. Exs. A (Dep. of William Gibbs), B (Richard Farman Dep.) and C (Peter Popov Dep.). Saudi claims that after being anchored in a windy, salt-water bay with corrosive spray in Indonesia for thirteen years, from 1981 until 1994, MTL's personnel at Keppel Shipyards in Singapore supervised and participated in the reactivation and refurbishment of the vessel, which included inspection and testing, and thereafter maintained and managed the tanker and MTC and MTL are therefore liable as both a manufacturer and a designer of the offending crane in dispute.

The Restatement (Second) of Torts § 404 (1965) states, "One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of a chattel." The

district court in Todd Shipyards Corp. v. Turbine Service, Inc., 467 F. Supp. 1257, 1286 (E.D. La. 1978), aff'd in part and reversed in part on other qrounds, 674 F.2d 401 (5th Cir. 1982), cert, denied, 459 U.S. 1036 (1982), stated,

> A repairer is generally subject to the same liability as that imposed upon a manufacturer. Restatement (Second) of Torts 404 (1965). Such manufacturers have a duty to exercise reasonable skill and care in the design and manufacture of their products, commensurate with the risk of harm flowing from normal use of that product. This duty also binds the manufacturer with respect to component parts incorporated into its final product but manufactured by another. A manufacturer thus has an affirmative duty to make such tests and inspections, during and after the process of manufacture, which are commensurate with the dangers involved in the intended use of the product.

The repairer need not have changed the condition of the product for the worse; liability may be imposed if the product did not leave the repairer's hands in that safe condition in which a competent contractor would have put it and that if the product was used in reliance upon the care and competence of the repairer. Id., citing Restatement (Second) of Torts § 404.

MTL's Chief Engineer, Farman, admitted that he supervised the remanufacture, refurbishing and repair of the portside crane, but did not know about the proper design function maintenance procedures and repairs that were required to be performed on that crane. Ignorance is not a defense to liability, argues Saudi, and a person who undertakes to repair or remanufacture an instrumentality for use by others will be held to the standard, above that possessed by the general public, of a technician in that field's reasonable skill, care, and knowledge of the arts, materials, and processes. Todd, 467 F. Supp. at 1288-89.

Moreover, Saudi contends, Acomarit's failure to discover and remedy the condition is no defense because a repairer or remanufacturer is subject to liability even if a dangerous condition is discoverable by an inspection that another party under a duty to make. Id. at 1289 (failure of Todd to supervise or inspect adequately was a foreseeable risk of repairer or manufacturer's negligence), citing Restatement (Second) of Torts § 396 (a repairer or manufacturer is subject to liability even if a dangerous condition is discoverable by an inspection which another party would be under a duty to make). Although Acomarit was the operator of the S/T Marine Atlantic when Saudi was injured and had a duty to make a quadrennial survey of the crane and carry out any needed repairs, that fact does not insulate MTL and MTC from liability because they should have anticipated that Acomarit and other subsequent managers might not remedy the dangerous and defective condition of the crane that they failed to repair or remedy properly. Restatement (Second) of Torts § 447; Moyer v. Martin Marietta Corp., 481 F.2d 585, 591 (5th Cir. 1973), abroqated on other grounds, Baldassaro v. United States, 64 F.3d 206 (5th Cir. 1995) .

Because the Court finds that Plaintiff has raised a genuine legal and factual issue for trial with evidence unaddressed and uncontroverted by MTC and MTL, the Court

ORDERS that MTL and MTC's motion for summary judgment is DENIED.

SIGNED at Houston, Texas, this 14th day of December, 2000.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Appendix M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS.
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment andUnited States Courts Southern District of Texas Appurtenances, In Rem, a/k/a ENTERED M/T Marine Atlantic, Her DEC 15 2000 Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINE CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP,, L. P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, is inter alia a joint motion for partial summary judgment dismissing Plaintiff's claim for punitive damages (#182), filed by Defendants Marine Atlantic Ltd., Osprey Ship Management ("Osprey"),[1] Marine Transport Corporation ("MTC"), Marine Transport Lines, Inc. ("MTL"), and Koch Shipping, Inc. ("KSI").

The controlling pleading, Plaintiff's third amended complaint (#73), alleges six causes of action: (1) negligence and gross under common law against all Defendants; (2) unseaworthy vessel and equipment under maritime law against all Defendants; (3) negligence under the Jones Act against all Defendants; (4) breach of warranty of merchantability under pendant jurisdiction against Defendants Valmet-Appleton, Inc., Appleton Machine Co., Inc., Appleton Marine, Inc. and John Doe Company (designer of the crane), now moot because all these Defendants have been dismissed from this action; (5) strict liability in tort for defective design or manufacture and failure to warn against the alleged designers and/or manufacturers of the crane, Defendants Valmet-Appleton, Inc., Appleton Machine Company, Appleton Marine Company, and John Doe Company, now moot for the same reason as the fourth cause of action; and (6) an action in rem against the tanker Marine Atlantic under maritime law.

The movant seeking a federal summary judgment initially must inform the court of the basis for his motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that he is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) . The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfq. Co., 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P. 56(c) . The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. at 252.

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[1] Incorrectly sued as Osprey Accomarit Ship Management.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, he "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment nay be granted." Id., 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.) , cert. denied, 506 U.S. 825 (1992). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. Salis v. Carpenter, 908 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990). Defendants argue that punitive damages are not recoverable under the claims against them under maritime law (negligence, unseaworthiness, and Jones Act) . Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1507 (5th Cir. 1995) (en banc) (specifically holding that punitive damages under general maritime law are not available to pay maintenance and cure of an injured seaman; because punitive damages are considered nonpecuniary and non-pecuniary damages are barred under the Jones Act, "If the situation is covered by a statute like the Jones Act, the [Death on the High Seas Act], and the statute informs and limits the available damages, the statute directs and delimits recovery available under the general maritime law as yell.;'), cert. denied, 516 U.S. 1046 (1996). Nor are they recoverable in an action for unseaworthiness. Hunter v. Seabulk Offshore, Ltd., 993 F. Supp. 973 (E.D. La. 1998) (discussing expansion of principle to preclusion of recovery of punitive damages by a seaman against a nonemployer under the general maritime law). Defendents point out that in

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limits damages or recovery on his claims against Defendants, who are not his employer, for product liability, breach of warranty and negligence in the remanufacture and/or maintenance of goods. Saudi is not seaman, as defined by the Jones Act, with respect to shipowner Marine Atlantic Ltd. or manager Osprey, or remanufacturer MTL or vessel-provider Koch. He reads the holding of Guevara narrowly as holding that the Jones Act limitation of damages prevented recovery of punitive damages in a parallel action under general law. He also notes that Defendants failed to point out that the Fifth Circuit failed to resolve the question of whether a claim for punitive damages can be brought at all under maritime law in the context of Morales v. Garijak, Inc., 829 F.2d 1355 (5th Cir. 1987). He also points to Dr. Salah E. Mahmoud's affidavit submitted in opposition to MTL's motion for summary judgment, which states that performing a lifting survey, as was purportedly done by the American Bureau of Shipping, Inc. six months before Saudi's accident, would have prevented serious injury to Saudi. Saudi contends that the affidavit establishes fraudulent testing and certification, and that such "callous, recalcitrant, arbitrary, capricious, or willful, callous and persistent" conduct supports punitive damages. If ultimately believed, the affidavit establishes that there was fifteen years of corrosion of the crane before it failed and that the failure to maintain the crane for that period displays conscious disregard of Saudi's welfare and satisfies the test for punitive damages.

In reply, Defendants cite additional cases supporting their contention that no punitive damages have been authorized in personal injury cases under maritime law. See, e.q. , In re Amtrack "Sunset Limited" Train Crash, 121 F.3d 1421, 1429 (11th Cir. 1997), cert. denied sub nom. Altosino v. Warrior & Gulf Naviqation Co., 522 U.S. 1110 (1998) ; In re Diamond B Marine Serv., Inc., Nos. CIV A-99-951, A-99-984, A-99-1346, 2000 WL 805235, at *2 (E.D. La. June 21, 2000); In re Diamond B Marine Serv., Inc., Nos. CIV A-99-951, A-99-984, A-99-1346, 2000 WL 222847, at *1 (E.D. La. Feb. 23, 2000). Defendants further insist that the facts here do not fit any of the recognized exceptions (willful failure to furnish maintenance and cure to a seaman, intentional denial of a vessel owner to furnish a seaworthy vessel to a seaman, and rare wrongdoings). They have not willfully failed to furnish maintenance and cure to a seaman and owe no such obligation to Saudi because they are not Saudi's employer. Marine Atlantic Ltd., as vessel owner, did not intentionally deny a seaworthy vessel to a seaman, and there is no valid claim against it because Plaintiff's response conceded that "Saudi is not even a seaman as defined by the Jones Act with respect to" Marine Atlantic Ltd. Finally, there is no evidence of wrongdoing in this case Thus maritime precedent bars Saudi's recovery of punitive damages

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Defendants about the law and the absence of evidence of wrongdoing. See also Miller v. American President Lines, Ltd., 989 F.2d 1450, 1457-59 (6th Cir. 1993) ("Looking primarily to the federal maritime wrongful death statutes for guidance, we hold that punitive damages are not available in general maritime law unseaworthiness action for the wrongful death of a seaman"), cert. denied, 510 U.S. 915 (1993); Horsley v. Mobil Oil Corp., 15 F.3d 200 (1st Cir. 1994) (punitive damages not available on unseaworthiness claim after Miles v. Apex Marine Corp., 498 U.S. 19 (1990)); Glynn v. Roy Al Boat Management Corp., 57 F.3d 1495, 1505 (9th Cir. 1995), cert. denied, 516 U.S. 1046 (1996); Kraljic v. Berman Enters., Inc., 575 F.2d 412 (2d Cir. 1978); Rutherford v. Mallard Bay Drilling, L.L.C., No. CIV A -99-3689, 2000 WL 805230, *1-3, 4 (E.D. La. June 21, 2000); Anderson v. Texaco, 797 F. Supp. 531, 534 (E.D. La. 1992) (concluding that a plaintiff who is statutorily barred from receiving a punitive award under the Jones Act cannot recover punitive damages by couching his claim in the judge-made general maritime law of negligence and unseaworthiness); Ellender v. John E. Graham & Co., 821 F. Supp. 1136 (E.D. La. 1002) (recovery of punitive damages by a seaman against nonemployer under the general maritime law is precluded); Earhart v. Chevron U.S.A., Inc.. 852 F. Supp. 515, 516 (E.D. La. 1993) (punitive damages are not recoverable by nonseamen under the general maritime law); and Penrod Drillinq Corp. v. Williams, 868 S.W.2d 294 (Tex. 1993) (per curiam).

Therefore the Court

ORDERS that Defendants' motion for partial summary judgment on punitive damages is GRANTED.

SIGNED at Houston, Texas, this 14th day of December, 2000.

Melinda Hannon
United States District Judge

Appendix N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-99-2367

CAPTAIN SHERIFF SAUDI,
Plaintiff
VS
S/T MARINE ATLANTIC, Her Equipment and Appurtenances, In Rem (a/k/a M/V Marine Atlantic, Her Equipment and Appurtenances, In Rem, a/k/a M/T Marine Atlantic, Her Equipment and Appurtenances, In Rem), MARINE ATLANTIC, LTD., JOHN DOE COMPANY, Owner of the Vessel Marine Atlantic, ACOMARIT SERVICES MARITIMES, S.A., OSPREY ACOMARIT SHIP MANAGEMENT, INC., VALMET- APPLETON, INC., APPLETON MACHINE CO. (Appleton Marine Division), APPLETON MACHINE CO., INC., APPLETON MARINE, INC., JOHN DOE COMPANY, Designer of the Crane, KOCH PETROLEUM GROUP, L.P., JURONG SHIPYARD, LTD. AND UNITED STATES TRUST COMPANY OF NEW YORK,
Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above referenced admiralty and maritime personal injury action, arising from the May 17, 1999 fall of Plaintiff Captain Sheriff Saudi ("Plaintiff" or "Saudi") from a lifting basket as he was transferred from the tanker Marine Atlantic to the M/V American Discovery because of the collapse of an allegedly defective portside crane on the tanker Marine Atlantic, is inter alia Defendants Koch Shipping, Inc. ("KSI") and Koch Supply & Trading Company, Limited n/k/a Koch Petroleum Group, L.P.'s ("KS&T's")(collectively, "Koch's") motion for summary judgment (instrument #147).

The controlling pleading, Plaintiff's third amended complaint (#73), alleges six causes of action: (1) negligence and gross negligence under common law against all Defendants; (2) unseaworthy vessel and equipment under maritime law against all Defendants; (3) negligence under the Jones Act against all Defendants; (4) breach of warranty of merchantability under pendant jurisdiction against Defendants Valmet-Appleton, Inc., Appleton Machine Co., Inc., Appleton Marine, Inc. and John Doe Company (designer of the crane), now moot because all these Defendants have been dismissed from this action; (5) strict liability in tort for defective design or manufacture and failure to warn against the alleged designers and/or manufacturers of the crane, Defendants Valmet-Appleton, Inc., Appleton Machine Company, Appleton Marine Company, and John Doe Company, now moot for the same reason as the fourth cause of action; and (6) an action in rem against the tanker Marine Atlantic under maritime law.

The movant seeking a federal summary judgment initially must inform the court of the basis for his motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that he is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) .The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfq. Co., 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. a. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. at 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the non-movant, he "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. Anderson, 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id., 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 506 U.S. 825 (1992). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. Salis v. Carpenter, 908 F.2d 299, 305 (5th Cir. 1992) ; Luian v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990).

KSI and KS&T move for summary judgment on Plaintiff's three causes of action against them. The first alleges negligence and gross negligence based on their responsibility to maintain the crane, but failure to do so. Plaintiff claims that KSI and KS&T knew or should have known that the crane was used to transport people from ship to ship and that improper maintenance would pose an unreasonable risk of harm. Plaintiff further alleges that Defendants demonstrated a conscious disregard for Plaintiff's rights and that Plaintiff is entitled to punitive damages. A second cause of action asserted under maritime law against KSI and KS&T and other Defendants is failure to provide safe and seaworthy vessel and equipment, for which Plaintiff also seeks punitive damages. His third cause of action against KSI and KS&T, as well as the other Defendants, is breach of duty to provide a safe place to work under the Jones Act, 46 U.S.C. app.§688.[1]

KSI and KS&T maintain they are entitled to summary judgment and dismissal from this suit for two reasons: (1) KSI was only the time charterer of the Marine Atlantic and had no control over the vessel or its equipment, including the crane, at the time of the accident at issue; and (3) KS&T did not own, charter, control, operate, manage, inspect, test or service the Marine Atlantic or the crane at issue, and thus owed no duty and is not a proper party to this action. KSI and KS&T provide a copy of the Time Charter Party, dated December 24, 1998, with additional typewritten terms attached, as Exhibit A to their motion. As Exhibit B they provide a copy of a Tanker Lightering[2] Voyage Charter Party entered into by American Eagle Tankers, Inc. ("AET") and KS&T on or about September 1, 1996.

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[1] The other causes of action are not against KSI and KS&T. Plaintiff's fourth and fifth causes of action are against the designer and/or manufacturer of the crane, and his sixth is an action in rem against the ship under maritime law.

KSI and KS&T explain that at the time of the accident in dispute, Plaintiff, an employee of AET, which was contracted by KS&T to conduct lightering operations pursuant to the contract in Ex. B, was being transferred from the tanker Marine Atlantic to the vessel American Discovery, which was owned by AET, in Galveston Lightering Area 2 in the Gulf of Mexico, when he fell approximately fifty feet into the ocean from the crane/basket device located on the tanker Marine Atlantic. Plaintiff was the mooring master provided by AET and was in overall charge of the lightering operations. Ex. C at 1, Ship-to-Ship ("S.T.S.") Superintendent Job Description, signed by Plaintiff. Exhibit C, produced by AET in response to a subpoena duces tecum, consists of documents relating to Plaintiff's qualifications and experience.

KS&T contends that it had no relation to the tanker Marine Atlantic other than the fact that it had chartered the M/V American Discovery to facilitate the lightering operations. Plaintiff has not alleged that the M/V American Discovery was unseaworthy, so KS&T is not a proper party to this suit. KS&T's only tie to the tanker Marine Atlantic is the Time Charter Party which it entered into with the owners of the tanker Marine Atlantic.

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[2] "Lightering is the process of transferring liquid cargo in bulk between tank vessels." Marine Atlantic Ltd. and Osprey's motion for partial summary judgment addressing Plaintiff's Jones Act and unseaworthiness claims and motion to strike jury demand (#192) at 1 n.2.

KS&T argues that marine law applies to Plaintiff's negligence and unseaworthiness claims because the accident occurred in navigable waters, at the time Plaintiff was engaged in the traditional maritime activity of performing his duties as AET's mooring master, and Plaintiff's injury was allegedly caused by the collapse of a portside crane on the tanker Marine Atlantic and part of the vessel's equipment. Green v. Vermillion Corp., 144 F.3d 332, 336, 338, 341 (5th Cir. 1998) (for admiralty jurisdiction a tort must have a maritime locality and "the facts and circumstances of the claim must bear a significant relationship to traditional maritime activity," as determined by examining four factors: the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and the type of injury, and traditional concepts of the role of admiralty law"), cert. denied, 526 U.S. 1017 (1999).[3] Saudi was injured in navigable waters aboard a tanker vessel while performing a traditional maritime activity of mooring the vessel for lightering and his injury allegedly was caused by corrosion of the vessel's portside crane.

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[3] In Green, the Fifth Circuit, noting that " [a]dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters" and that "the relationship to traditional maritime activity required for the invocation of admiralty jurisdiction" may be satisfied by maritime employment, found that Green was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel, that Vermilion owned the vessel on which Green fell, that the vehicle involved was a vessel routinely employed on navigable waters, that the injury was caused by an unkept deck, that Green's injury was not uncommon in the maritime context, and that application of maritime law and maritime jurisdiction does not offend long evolved principles of maritime law. Id. at 336. Concluding that federal admiralty rights have supremacy over state law where uniformity is important and rejecting any limitation of

Furthermore, as a matter of Fifth Circuit law, a time charterer as a general rule assumes no liability for negligence of a vessel's crew or the unseaworthiness of the vessel unless the plaintiff shows that the charter parties intended otherwise. Mallard v. Aluminum Co. of Canada Ltd., 634 F.2d 23G, 242 n.5 (5th Cir.), cert. denied sub nom. Erikson v. Mallard, 454 U.S. 816 (1981). Clear express language is required in the time charter to rebut the presumption that the charter parties did not intend to shift the responsibility for negligence of a vessel's crew or unseaworthiness of a vessel to the charterer. Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc., 830 F.2d 1332, 1343 (5th Cir. 1987). Defendants explain that these rules arise from the distinction between demise and non-demise charters. Under a demise, or bareboat charter, the owner of the vessel transfers full possession and control to the charterer, which furnishes the crew and

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admiralty law only to wrongful death suits, the Fifth Circuit held that the exclusive remedy provision of the Louisiana Workers' Compensation Act did not bar Green from asserting a maritime negligence claim against Vermilion for the nonfatal injuries he sustained during the course of his employment while on navigable waters. Id. at 341. It observed, "The key factor is maintaining uniformity in admiralty law and preserving the rights granted to maritime workers, not the degree of harm the worker suffers. An action for negligence has long been a vestige of general maritime law; subjecting it to the ebbs and flows of state legislation would disrupt the essential features of admiralty law." Id.

maintenance for the vessel. Thus the demise or bareboat charterer is the owner pro hac vice of the vessel for the duration of the contract and is therefore responsible in personam for the negligence of the crew and the unseaworthiness of the vessel. Forrester v. Ocean Marine Indem. Co., 11 F.3d 1213, 1215 (5th Cir. 1993). Under a non-demise charter, which encompasses both time charters and voyage charters, the charterer may use the vessel for a specified period of time, but the vessel owner retains primary possession and control of the vessel and the time charterer does not control the details of its operation. Therefore the time charterer is not liable for any negligence of the crew or unseaworthiness of the vessel. Id.

The time charterer may, however, be liable to third parties for its own negligence. Id.; Graham v. Milky Way Barge, Inc., 811 F.2d 881, 893, op. superseded on rehearing, 824 F.2d 376, 387-88 (5th Cir. 1987) (time charterer was independently negligent in dispatching vessel to perform in unsheltered open reaches of the Gulf of Mexico in bad weather). The Fifth Circuit, in Hodqen v. Forest Oil Corp., 87 F.3d 1512, 1517-20 (5th Cir. 1996), observed that case law suggests that a time charterer owes a hybrid duty, arising from tort and contract law, to persons with whom it has no contractual relationship, to exercise control in a reasonably exercises at least partial control, e.g., in choosing the timing, route, cargo, and general mission of the vessel's voyage. Id. at

1517, 1520. For instance, if the time charterer orders the vessel's crew to continue working despite dangers threatened by poor weather, the time charterer is not absolved of responsibility for any injury or damage. Id. at 151-8, 1521; Brown v. Link Belt Division of FMC Corp., 666 F.2d 110 (5th Cir. 1982) ; Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir_ 1983); Randall v. Chevron USA, Inc., 13 F.3d 888 (5th Cir.), modified, 22 F.3d 568, cert. denied, 513 U.S. 994 (1994). Thus a time charterer is only liable for negligence arising from its exercise of control within traditional spheres of activity, such as designating route, mission, cargo, or timing of the assignment. Hodgen, 87 F.3d at 1520. The parties may vary the traditional assignment of control by contract or custom, but without such an allocation, a time charterer owes no duty beyond the traditional spheres of timing, route, mission, and cargo. Id. See also Chisholm v. Maryland Inland Transportation Co., No. 99-0002, 2000 WL 64492 (E.D. La. 2000) (applying rules set forth in Hodgen and holding that where the plaintiff, who was injured while carrying a hose from a barge to a vessel with other crew members, made no allegations that and there was no evidence that, at the time of his injury, a time charterer was acting in one of the traditional spheres of a time charterer's activity and it was uncontested that the time charterer did not direct the crew to move the hose, the time charterer was not liable as a matter of law); Kerr McGee Corp., 830 F.2d at 1340-42 (time charterer not liable for any negligence related to condition of vessel where custom and terms of time charter party left control over and responsibility for safety of vessel solely in hands of vessel owner); Zepherin v. Conoco Oil Co., 884 F.2d 212 (5th Cir. 1989).

Defendants emphasize that in the time charter between KSI and the owners of the tanker Marine Atlantic, no provision varies the traditional allocation of responsibilities between the time charterer and the vessel owner. Thus all equipment located on the vessel, including the disputed portside crane, was the responsibility of the vessel owners. The transfer of Plaintiff from the M/V Marine Atlantic to the vessel American Discovery by that crane was within the exclusive control of the crews of the two vessels. They maintain that Plaintiff has not alleged that the timing of this operation had anything to do with the accident. Thus as a matter of law, they insist, KSI is not liable to Plaintiff for the alleged unseaworthiness of the vessel or for negligence under maritime law.

Nor, contend KSI and KS&T, are they liable under the Jones Act. The Jones act provides seaman with a suit for damages against their employers for injuries incurred while at sea. Volyrakis v. M/V Isabelle, 668 F.2d 863, 865 (5th Cir. 1921); Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231, 235-36 (3d Cir.), cert. denied, 501 U.S. 919 (1999). Plaintiff was an employee of American Eagles Tankers ("AET") at the time and therefore cannot recover from KSI and KS&T under the Jones Act.

Plaintiff's response in opposition, which the Court finds extremely difficult to follow, states that AET was employed as an independent contractor by the Koch Defendants to engage in lightering operations on S/T Marine Atlantic. He argues that a fact issue exists whether the Koch Defendants "tested, inspected or certified" the vessel, including its portside crane, as alleged in the complaint. If they did, they may be liable to Plaintiff for his first three causes of action against them: failure to properly maintain or inspect the crane, demonstrating a conscious disregard for Plaintiff's rights; failure to provide Plaintiff a safe and seaworthy vessel and equipment; and breach of their duty to provide Plaintiff with a safe workplace. As for the Jones Act claim, Plaintiff argues that he stands in the position of an employee to an independent contractor, as established by admissions and other evidence.

Although the Koch Defendants argue that KSI had no control over the vessel or its equipment, Saudi points to the deposition of a Koch-designated witness, R.E. Brown, who conceded that Koch "might have had personnel who remained onboard" and had the right of control of the vessel under the charter contract. Ex. A, Brown Dep., p. 179, 11. 17-25; p. 180, 11. 1-19. Plaintiff asserts that Koch personnel, Joseph Tan and Frances Tan, were responsible for monitoring the operations of the vessel and would have been aware that when the vessel was first vetted[4] by Koch, the quadrennial inspection of the portside crane required by the terms of the vessel's ship registry in Liberia had not been performed. Affidavit of Captain Saudi, Ex. B. Saudi hopes to show that Joseph Tan was a cargo operations employee of Koch, that Francis Tan was an outside contractor hired by Koch as a cargo inspector and that both were on board and knew of continued operation of the vessel charter contract was entered into such knowledge is imputable to the Koch Defendants who are accordingly liable for a failure to warn. Ex. H, letter from Koch to owner of vessel requesting that Joseph Tan and Frances Tan be accommodated onboard.

Saudi claims there is an issue as to whether the Koch Defendants are charterers. The issue is not ripe for summary judgment because discovery is not complete, urges Saudi.

Saudi represents that it is undisputed that Koch Defendants vetted the vessel and its equipment and performed a survey conducted by PacMarine Services. Ex. E and H. The vetting would or should have revealed the dangerous condition of the portside crane, he argues. Restatement (Second) of Torts § 324A. Section 324A provides,

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[4] According to Plaintiff, vetting "is the process whereby companies chartering a vessel . . . inspect the vessel to determine its ability to perform under its contract." He states that Koch Defendants have admitted that the vetting inspection and survey include the safety of the ship.

Liability to Third Person for Negligent Performance of Undertaking

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm; or
> (b) he has undertaken to perform a duty owed by the other to the third person; or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Saudi argues that the Supreme Court refers to this rule as the "Good Samaritan" doctrine. United States v. Empresa de Viacao Aerea Rio Grandense, 104 S. Ct. 2755 (1984) . The Third Circuit has examined it in the context of government inspections and Section 403 of the Restatement of Torts (Second), providing for liability where one provides a chattel known to be dangerous for the use of another who is thereby injured. Saudi claims that Koch knew or should have known of the dangerous condition of the cargo hose cranes and had a duty to warn Saudi of such dangers. Reese v. Mercury Marine Division of Brunswick Corp., 793 F.2d 1416 (5th Cir. 1986); Section 324A of the Restatement of Torts (Second) . He also submits his own affidavit to demonstrate that he and his employer, AET, relied on Koch Defendants' reputation for safety in the industry, based on its vetting program, when he allowed himself to be lifted aboard the vessel chartered by Koch. He asserts that since Koch Defendants undertook the vetting, they had a duty to perform it competently. Because they failed to do so, they are liable to Saudi for negligence and failure to warn.

Saudi further claims that under normal vetting practice in the industry, Koch Defendants, as the time charterer, would have received safety certificates on the vessel's cranes, including the one that injured Plaintiff, even though Brown claimed that Koch had no reason to demand a certificate for the vetting. Saudi insists that he has had more experience than Brown in the maritime industry and vetting of ships and therefore Brown's statement that Koch had no reason to demand such a safety certificate is refuted by Saudi's affidavit and other admissions binding on Defendants. Ex. A, Brown's Dep., p. 222, 11. 12-15, p. 224, 11. 2-16; Ex. 58, Brown Dep., p. 224, 11. 2-8, describing Koch's vetting practices. Saudi points to a contradiction in statements by Brown, i.e., that he only presented Koch's vetting program internally to Koch people and his conflicting statement that it was presented to managers of various boats and shipping people. He claims that Koch obtained a reputation in the maritime industry for chartering safe vessels based on its vetting program, disseminated in a "PowerPoint Presentation," a slide show.

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[5] The Court notes that Saudi is misrepresenting Brown's testimony by manipulating Brown's first remark out of context. Brown testified during his deposition that the PowerPoint presentation of Koch's vetting program was made "to managers of various boats, to shipping people . . . to explain Koch's purpose for vetting vessels." When immediately asked if "the presentation is made to boat owners or people in the maritime industry that are

Ex. 58; Brown Dep. at p. 224, Ex. A to Plaintiff's Response.

Saudi further claims that because the Koch Defendants provided the vessel S/T Marine Atlantic for use in lightering operations under the contract with AET, the Koch Defendants are liable under Section 388 of the Restatement of Torts (Second) (1965), "Chattel Known to Be Dangerous for Intended Use," which provides,

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to know that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

See also Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 923 (9th Cir. 1987), and Edwards v. Mazor Masterpieces, Inc., 295 P.2d 547 (D.C. Cir. 1961). The Court observes that neither of these cases is a maritime suit, nor related to a time charterer.

In an amended reply, the Koch Defendants insist Saudi

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not employed by Koch," Brown replied, "No it's made internally to Koch people" and that to his knowledge it had never been shown or disseminated to anyone other than Koch employees. Brown Dep. at 224-25, Ex. A to Plaintiff's Response.

has presented no summary judgment evidence demonstrating that they are liable to him. Instead Saudi has argued without any evidence that Koch operated the vessel, that a fact issue exists as to whether Koch tested, inspected or certified the vessel, and that Koch should have discovered the latent defect in the crane that caused his injuries. According to the Koch Defendants, Saudi has misrepresented the testimony of Koch executive Robert E. Brown in an effort to show that Koch controlled operations of the vessel, cites no authority and provides not evidence for his conclusory argument that Joseph Tan and Frances Tan were responsible for monitoring the operations of the tanker Marine Atlantic, and the mere fact that they went on board at some time before Saudi's accident does not show that they had anything to do with inspecting the crane or operating the vessel. Indeed Brown's testimony explains that Joseph Tan was responsible for cargo operations and Francis Tan was hired for cargo loss and operations expertise. Brown's Dep. at p. 180, ll. 20-23, Ex. A to Plaintiff's Response. Contrary to Saudi's contentions, Koch Defendants claim that it is undisputed that Acomarit was the operator of the vessel throughout Koch's time charter of it.

Moreover, Saudi contends that Koch is liable under the Restatement (Second) of Torts § 423A because it did not properly inspect the vessel and discover the crane's latent defect and that there is an issue as to whether Koch inspected the vessel. Koch argues that the evidence reflects that Koch did not inspect the vessel or the crane, not to mention not discover any latent defect in the crane. Koch acknowledges that it hired an outside contractor, PacMarine services, to do an on-hire survey of the vessel. PacMarine's resulting report on that January 21, 1999 survey of the tanker Marine Atlantic states that its purpose was "to determine the general condition of the cargo tanks and main deck areas in way of cargo tanks and to ascertain the bunkers remaining on board at the time of delivery of 'On Hire.'" Ex. D. Such a survey, even if it had been done by Koch, would not have given rise to any liability on Koch's part. In addition, Koch accuses Saudi of altering copies of the survey in its Exhibit E.

Koch also emphasizes that Saudi presents no proof that the vessel and its lifting cranes were required to have a quadrennial inspection or that Koch was in any way responsible for such an inspection. Koch notes that in Saudi's response to Marine Transport's renewed motion for summary judgment, 2.8 at p. 7, Saudi even states that the quadrennial inspection is a misnomer and that by the early 1990's such inspections, which are part of the classification of a ship, were only required every five years. Richard Farman explained in his deposition that these classification inspections may not even include the lifting cranes. Ex. B to Plaintiff's Response to Marine Transport's Renewed Motion for Summary Judgment at pp. 7-17. Furthermore, Koch points out, Acomarit has produced documents showing that the portside crane had been inspected and certified within a month before the commencement of Koch's time charter party and less than six months prior to Saudi's accident. Ex. E to Koch's Amended Reply, Acomarit documents Nos. 296 and 297, showing the crane was certified and tested on March 27, 1998 and again on December 8, 1998. Furthermore, Koch's vetting file on the Marine Atlantic shows that the vessel was in the shipyard conducting its fourth special survey in December 1998 during Koch's vetting process. Ex. F, Koch Doc. No. 27. Thus even if the crane was not properly inspected, tested, or certified, there is no fact issue as to Koch's non-liability as the time charterer.

Koch further insists and demonstrates that there is no conflict in Brown's testimony about the presentation of Koch's vetting program and that Saudi has simply misrepresented Brown's testimony without any supporting evidence. Ex. A to Saudi's response, pp. 224-25. The managers of boats and shipping people to whom Brown stated the Powerpoint Presentation of Koch's vetting program was made are Koch personnel, and thus the presentation was only "made internally to Koch people." Id. at pp. 224-25. Koch also shows that Brown's representations were accurate, that KSI was the time charterer of the Marine Atlantic, and that KS&T n/k/a Koch Petroleum Group, L.P., contracted with Plaintiff's employer, AET, for lightering services. The evidence further demonstrates that Koch had no control over the operations of the vessel or its equipment, including the crane.

In addition, Koch argues that the summary judgment evidence demonstrates that its vetting cannot serve as a basis for liability here. Saudi relies on the Restatement (Second) of Torts 324A for his argument that Koch's vetting would or should have evidence, to the contrary shows that Koch did not render services to "another" under its vetting program, the purpose of which was an internal determination whether a vessel should be taken under charter. Brown's deposition testimony described the vetting of the Marine Atlantic and made clear that during it no inspection of the vessel was done as part of the analysis. Brown Dep. Ex. E at pp. 38-43. Furthermore, Koch emphasizes, Saudi fails to cite a single case in which a time charterer of a vessel was held liable based on 324A. All cases cited by Saudi are distinguishable from this one, Koch urges, and are not decided under general maritime law; he discusses two in detail: United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Variq Airlines), 467 U.S. 797, 821 (1984) (holding that the discretionary function exception to the Federal Tort Claims Act precluded tort actions based on the alleged negligence of the Federal Aviation Administration in failing to check certain thing in the process of certi- ficating the aircraft for use in commercial aviation); and Merklin v. United States, 788 F.2d 172 (3d Cir. 1986).

Koch reiterates that the Fifth Circuit has held that a time charterer assumes no liability for the vessel's crew or unseaworthiness of the vessel unless the plaintiff demonstrates that the charter parties intended otherwise. Mallard, 634 F.2d at 242 n.5. Only where there are no federal cases or established federal admiralty laws should a court look to general common law and, in particular, the Restatement (Second) of Torts, to find the governing law. Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd., 959 F.2d 49, 53 (5th Cir. 1992).[6]

Koch did not operate the vessel or inspect, test or certify the vessel or its portside crane and had no duty to do so,

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[6] Koch points out that under the "Good Samaritan" rule, which has at times been applied under general maritime law, the defendant must have undertaken to perform the specific task he is charged with having performed negligently, i.e., the Good Samaritan's duty is measured by the scope of his undertaking. Patenas v. United States, 687 F.2d 707, 716 (3d Cir. 1982) (suit against the United States for allegedly negligent inspection of a vessel by the Coast Guard shortly before it exploded). Even when the defendant specifically undertook the task and allegedly performed it negligently, he is liable only where (1) his failure to exercise reasonable care increases the risk of harm; (2) he has undertaken to perform a duty owed by another to a third person; or (3) the harm is suffered because of reliance of the other or the third party upon the undertaking. Restatement (Second) of Torts 324A. Even if Koch had inspected the vessel, it insists that failing to discover a risk by inspections does not increase the risk of harm. Patentas, 687 F.2d at 716-17; Good v. Ohio Edison Co., 149 F.3d 413, 421 (6th Cir. 1998). There is no evidence that Koch did anything to increase the risk to Saudi from the portside crane. Nor is there evidence that Koch undertook a duty which anyone else owed to Saudi or that Saudi suffered harm because of anyone's reliance upon the alleged undertaking. Patentas rejected the argument that once the Coast Guard undertook inspection of the vessel, it engendered reliance and was obligated to use due care. While Saudi's affidavit states that he relied on Koch's reputation in the marine industry for carrying out competent vetting and safety inspections, it does not state that he relied on any specific inspection or affirmative action by Koch with respect to the Marine Atlantic. See also, Good v. Ohio Edison, 149 F.3d at 421 (finding that testimony that mariners generally rely on Coast Guard's dissemination of information failed to address whether the particular accident involved detrimental reliance on the part of the pleasure boat owner).

Koch maintains. Nor did it owe a duty to anyone with respect to its vetting of the Marine Atlantic. Koch concludes that Saudi has failed to present any evidence or raise any genuine issues of material fact of liability.

In reply Saudi refers to the affidavit of his expert witness, Dr. Salah E. Mahmoud, filed as Ex. D to his Opposition (#166) to the motion for Summary Judgment of Defendant Marine Transport, to controvert the testimony of Marine Transport Lines' Engineer, Richard Farman, on the issue of whether a quadrennial or quadrennial inspection is required. He contends that Koch has confused a lifting survey test with a quadrennial survey test. Dr. Mahmoud's affidavit states that a quadrennial test, unlike the lifting test, requires that all moving parts of the lifting item, such as a portside crane, be disassembled and inspected to insure that a catastrophic failure does not occur. Saudi further insists that Dr. Mahmoud's affidavit demonstrates that the condition of the moving parts of the portside crane exhibited at least fifteen years of extended corrosion and thus refutes any claim that any competent quadrennial survey or vetting of the crane was performed in 1998. Saudi further points out that the Operator of the Marine Atlantic certified that the last date the crane had been lifttested was March 27, 1998, not December 1998.

Saudi emphasizes that the most important fact establishing Koch Defendants' liability here is that they supplied the vessel to Saudi's employer for use in performing the lightening contract that AET had entered into with them and that Koch directed AET to send AET's employee, Saudi, to board the Koch-chartered S/T Marine Atlantic to carry out lightering operations for Koch's ultimate economic benefit and business purpose. He insists that the sections 388 and 392[7] of the Restatement of Torts (Second) governing the liability of "persons supplying chattels for the use of others" establishes Koch's vetting as a basis for its liability. Moreover, Saudi urges that sections '388 and 392 are applicable under federal maritime law. DiRago v. American Export Lines, Inc., 636 F.2d 860, 864 (3d Cir. 1981) (applying Restatement (Second) of Torts 452 to shipowner's failure to inspect cargo where shipowner knew or had reason to know condition of cargo created an unreasonable risk of and caused harm to longshoreman); Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) (imposition of section 302A liability on a ship owner for negligence resulting in injury to a longshoreman, where an actor realizes or should realizes that an act or omission involves unreasonable risk of harm to another, requires as a prerequisite the existence of a duty to take some action to remedy the dangerous condition); Houston-New Orleans, Inc. v. Page Engineering Co., 353 F. Supp. 890, 899 (E.D. La. 1972) (adopting Restatement (Second) of Torts sections 395 and 392 in imposing liability on supplier of defective equipment and on repairman for failure to discover defect in a dragline control panel). [8] Saudi maintains that Koch chartered and supplied a defective chattel, the vessel, to AET, which stood in the position of an independent contractor, for a business purposes, i.e., lightering operations, and is thus liable for his injuries. Saudi files his own person affidavit in support.

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[7] Restatement of Torts (Second) Section 392 (1965) provides,

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by whose persons for whose use the chattel is supplied (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or (b) if he fails to exercise reasonable care to discover its dangerous condition or character and to inform those whom he should expect to use it.

After reviewing the record and the applicable law, this Court agrees with the Koch Defendants that under clear Fifth Circuit law a time charterer is not liable unless the cause of harm is within a time charterer's traditional sphere of control and responsibility. Generally the time charterer who has no control over the operation of a vessel has no liability for the negligence of the crew or the unseaworthiness of a vessel unless the plaintiff shows that the parties to the time charter intended otherwise. Kerr-McGee, 830 F.2d 1332; Mallard, 634 F.2d at 342) n.5. Saudi has failed to show that the parties intended Koch Defendants to have responsibility for the alleged unseaworthiness of the vessel. A time charterer's traditional sphere of control also does not extend to providing a safe means of ingress and egress from a vessel. Hodgen, 87 F.3d at 1520. It is axiomatic that without the existence of a duty, there can be no negligence, as even the cases relied upon by Saudi reflect. See, e.q., Rich, 5:5 F.2d 541 (imposition of section 302A liability for negligence, where an actor realizes or should realizes that an act or omission involves unreasonable risk of harm to another, requires as a prerequisite the existence of a duty to take some action to remedy the dangerous condition). Thus the sections of the Restatement (Second) of Torts that Saudi seeks to apply to Defendants cannot create liability for Koch Defendants because under their time charter they had no responsibility for the condition of the portside crane. Moreover, Saudi has failed to demonstrate that KS&T was involved in any way with the M/V Marine Atlantic and Saudi's injury.

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[8] The court notes that in citing these two cases, Saudi ignores Koch's distinctions between obligations of a time charterer and of a vessel owner. Moreover, the instant suit does not involve a longshoreman.

Accordingly, the Court

ORDERS that KSI and KS&T's motion for summary judgment is GRANTED.

SIGNED at Houston, Texas, this 14th day of December, 2000.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE